

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

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BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN
RESERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, CHAIRMAN; ARCHIE ST. GODDARD, VICE CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOUISE C.
COBELL, TREASURER
andFORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT,
*Respondents.*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**PETITION FOR A WRIT OF CERTIORARI***Of Counsel:*

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QUESTIONS PRESENTED

1. Whether, in the absence of express congressional authorization, Indian tribes lack the power to tax non-members with whom the tribes have no consensual relationship.
2. Whether Indian tribes lack the power to tax the rights-of-way of nonmembers engaged in interstate commerce, where the rights-of-way were granted by the federal government and any discontinuance of their use is subject to exclusive federal regulatory determination.

**PARTIES TO THE PROCEEDING BELOW
AND RULE 29.1 STATEMENT**

All parties to the proceeding below are identified in the caption of this petition.

Burlington Northern, Inc. is the parent company of petitioner Burlington Northern Railroad Company. The partially owned subsidiaries of petitioner Burlington Northern Railroad Company are:

The Belt Railway Company of Chicago
Burlington Northern (Manitoba) Limited
Camas Prairie Railroad Company
Davenport, Rock Island and Northern Western
Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
Longview Switching Company
M T Properties, Inc.
Northern Radio Ltd.
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company

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ACCOUNTANT, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Burlington Northern Railroad Company (“BN”) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on January 25, 1991.

OPINIONS AND ORDER BELOW

The opinion of the court of appeals is reported at 924 F.2d 899 and is reproduced in the Appendix (“App.”)

at 1a to 15a.¹ The Ninth Circuit's unpublished order denying BN's petition for rehearing is reproduced at 48a to 49a. The opinion of the United States District Court for the District of Montana is reported at 701 F. Supp. 1493 and is reproduced at 16a to 47a.

JURISDICTION

The decision of the court of appeals was entered on January 25, 1991. Its order denying petitioner's timely request for rehearing and suggestion for rehearing *en banc* was filed on June 4, 1991. On August 2, 1991, Justice O'Connor entered an order granting petitioner an extension of time within which to file this petition to and including October 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND ORDINANCES INVOLVED

This case involves the following statutes and ordinances, relevant portions of which are set out verbatim in the Appendix:

Act of April 15, 1974, ch. 96, 18 Stat. 28 (App. at 50a);

Act of February 15, 1887, ch. 130, 24 Stat. 402 (App. at 51a);

Act of May 1, 1888, ch. 213, 25 Stat. 113 (App. at 54a);

XVII Ft. Peck Comprehensive Code §§ 301-324 (Utilities Tax) (1987) (App. at 57a);

Blackfeet Tribal Ordinance 80 (Providing for a Possessory Interest Tax) (1987) (App. at 63a).

STATEMENT OF THE CASE

In this case, BN challenges the authority of the tribes of the Blackfeet and Fort Peck Indian Reservations ("the

¹ This case began as two separate proceedings, *Burlington Northern R.R. v. The Blackfeet Tribe, et al.*, No. CV-87-120-GH, and *Burlington Northern R. Co. v. Fort Peck Tribal Executive Bd., et al.*, No. CV-87-55-GH. The district court decided the cases together, and the Ninth Circuit consolidated them on appeal.

Tribes") to impose property taxes on BN's rights-of-way across the reservations. Those rights-of-way, which were granted by the federal government nearly 100 years ago, now form a part of BN's main transcontinental rail line running across the upper Midwest to the Pacific Northwest. The courts below sustained application of the tax ordinances to BN as valid exercises of tribal sovereign power, even though no consensual relationship exists between BN and the Tribes and even though federal law prohibits BN from extending or abandoning its operations over these rights-of-way at will.

A. The Origins of BN's Rights-of-Way

Tribal lands within the Blackfeet and Fort Peck Indian Reservations are held in trust by the United States. These reservations were set aside for the use and occupancy of the Tribes in the Act of May 1, 1888, ch. 213, 25 Stat. 113.² That legislation ratified an agreement negotiated in 1886 and 1887 among the United States and the affected Tribes, to which neither BN's predecessor nor any other private entity was a party. Article VIII of the agreement and implementing legislation granted to the railroads (and others) rights-of-way through the reservations, subject to a Presidential determination that construction of such rights-of-way were required by the public interest.

In 1887, before the agreement creating the separate reservations was ratified, Congress granted to BN's predecessor a right-of-way through the area that would

² The lands now constituting the Blackfeet and Fort Peck Indian Reservations were originally part of a much larger area that was set aside for the use and occupancy of various tribes in the Act of April 15, 1874, ch. 96, 18 Stat. 28. *See also* Treaty of October 17, 1855, 11 Stat. 657; Executive Order of July 5, 1873, I Kappler 855; Executive Order of April 13, 1875, I Kappler 856. In 1886 and 1887, the tribes ceded vast areas of unoccupied land and retained separate reservations on the populated lands surrounding the Fort Peck, Fort Belknap, and Blackfeet Indian Agencies. *See* H.R. Rep. No. 3487, 49th Cong., 2d Sess. 1 (1886).

become the Fort Peck Reservation. Act of February 15, 1887, ch. 130, 24 Stat. 402. In 1890, subsequent to ratification, President Harrison approved an application of BN's predecessor for a right-of-way through the Blackfeet Reservation.

B. The Tribal Taxes Imposed Against BN

Although BN has operated lines across Indian reservations for over 100 years, until 1987 no tribe had ever attempted to impose property taxes on any of its rights-of-way. According to tribal officials, the Fort Peck and Blackfeet taxes at issue here were assessed in 1987 to meet budget shortfalls.³ The Tribes did not, however, impose broadbased taxes applicable to all persons and property within the reservations. Instead, they chose to limit the taxes so that they effectively would fall only on non-members of the Tribes.

The Fort Peck Tribes' "Utilities Tax" was adopted on January 27, 1987, and approved by the Area Director of the Bureau of Indian Affairs ("BIA") the next day. For purposes of the tax,

"Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.

XVII Ft. Peck Comprehensive Code § 301(a), App. at 57a. The tax is imposed on "utility property," which includes "all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation, other than an agreement transferring full title or full beneficial title." *Id.* § 301(c), App. at 57a. For this purpose, "agreement" includes a "right-of-way . . . agreement with the United States." *Id.*

³ Affidavit of Earl Old Person ¶¶ 7-8; Affidavit of Kenneth E. Ryan ¶ 14-16, 18 (Apr. 2, 1987).

The tax rate is 3 percent of the value of the utility property, except for cooperative rural electrical or telephone associations who pay at 1 percent. *Id.* § 303, App. at 58a. The ordinance exempts the Tribes, their subdivisions, agencies, and programs, and all enterprises and entities wholly owned by the Tribes; the United States, its subdivisions, agencies, and departments; and any utility whose on-reservation utility property is valued at less than \$200,000. *Id.* § 306, App. at 60a.

The Blackfeet Tribe adopted its "Ordinance Providing for a Possessory Interest Tax" on December 30, 1986, and it was approved by the BIA Area Director on April 9, 1987. App. at 40a. "Possessory interest" is defined as "any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation," and includes land held in fee or under lease, permit, easement or right-of-way. Blackfeet Ord. 80, § 3(h), App. at 64a. The tax imposed is 4 percent of the market value of the possessory interest. *Id.* § 4, App. at 65a.

The ordinance exempts utilities that exclusively serve the reservation, governmental entities, residential property, and commercial establishments. *Id.* § 11, App. at 66a-67a. But "[u]tility lines passing through the Reservation and providing service beyond the Reservation boundaries" are expressly subject to the tax. *Id.* § 11(1), App. at 66a. "Utility" is defined to include any "entity engaged in . . . transportation services," *id.* § 3(k), App. at 65a, and BN is the largest taxpayer under the ordinance. Old Person Aff. ¶ 9.

The record includes a study commissioned by the Blackfeet Tribe and conducted by the Economics Department of the University of New Mexico, in which the Blackfeet Tribe's tax was hailed precisely because it falls upon "captive" taxpayers, such as BN:

The cost associated with moving installed pipeline, electric transmission or telephone lines or the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Possessory

Interest Tax has considerable stability and predictability over time.

App. at 69a-70a. Another "desirable feature" of the tax, according to that study, is its "exportability":

With few exceptions, the property that would be subject to the Possessory Interest Tax are [sic] owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation and beyond the boundaries of Pondera and Glacier Counties. To the extent that utility bills are impacted by the [tax], it is clear that most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation

App. at 70a.

BN's 1987 tax liability under the Fort Peck ordinance was initially assessed at \$619,571—over 40 percent of the total revenues the tribes expected to generate from the tax. BN's liability under the Blackfeet ordinance for 1987 was initially assessed at \$531,709—also more than 40 percent of the anticipated liability for all potential taxpayers, based on projections by the University of New Mexico.

C. Proceedings Below

Before any taxes were collected under the ordinances, BN filed separate actions against the Tribes in the United States District Court for the District of Montana. In each case, BN sought an injunction against enforcement of the ordinance and a declaration that the Tribes lacked the sovereign authority to tax BN's rights-of-way. Preliminary injunctions issued in both cases and, pursuant to court order, BN paid the disputed taxes into the registry of the court.⁴

⁴ The disputed taxes for 1987 and subsequent years were adjusted to reflect a reduction in Montana's valuation of BN's property and have since been placed into escrow. Based on the revised property values, BN's annual tax liability under the two ordinances amounts to about \$640,000.

The cases were then submitted to the district court on the briefs, documentary evidence and affidavits of the parties. The district court upheld the two ordinances as legitimate exercises of the Tribes' inherent sovereign power to tax nonmembers, based exclusively on its finding that the Tribes retained a property interest in BN's rights-of-way. With respect to the Fort Peck Reservation, the court concluded that it was not clear whether Congress intended to extinguish the Tribes' property interest in the right-of-way granted to BN's predecessor in 1887. App. at 35a. The district court felt compelled to resolve that ambiguity in favor of the Tribes. *Id.* The district court also found no clear congressional intent to extinguish the Blackfeet Tribe's property interest in BN's right-of-way crossing its reservation. App. at 46a. Thus, it concluded "the territorial component essential to the valid exercise of the [Tribes'] taxing authority is satisfied." App. at 35a, 47a.

The Ninth Circuit affirmed on the basis of this Court's decisions in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). App. at 15a.⁵ It concluded that the Tribes had a "significant interest in the subject matter" because [BN's] activities involve use of tribal lands and because [BN] is the recipient of tribal services." App. at 10a (quoting *Colville*, 447 U.S. at 153). In the court's view, a consensual relationship between BN and the Tribes was not required: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed. The answer to that question is yes." App. at 11a (footnote omitted). Though the district court had made no findings on this point, the court of appeals

⁵ The court of appeals held that sovereign immunity barred suit against the Tribes and their governing bodies and dismissed them from the case. App. at 4a. However, it allowed the case to proceed against the tribal officials. App. at 5a.

concluded that “[BN] receives the intangible benefits of a civilized society . . . and the tangible benefits of police and fire protection.” App. at 10a.

REASONS FOR GRANTING THE WRIT

This case raises the issue of whether an Indian tribe can tax nonmembers with whom the tribe lacks a consensual relationship. The issue is a critical one. As budgetary demands of Tribes continue to increase, tribal governments can be expected to look beyond traditional sources of revenue to fund their operations. Many tribal taxes, like the ones upheld below, are purposely designed to impact nontribal constituencies located beyond the reservation who are powerless to protest their imposition. The scope of tribal power to tax nonmembers is therefore an issue of growing importance.

Confusion over the scope of an Indian tribe’s power to tax nonmembers is evident in decisions of the federal courts, tribal courts and councils, and the BIA. This confusion has arisen because of their failure to reconcile a series of this Court’s decisions addressing intrinsic limitations on tribal sovereignty. In several cases involving civil and criminal jurisdiction, the Court has recognized a fundamental distinction between the broad right of Indian tribes to govern their internal affairs and the right to exercise authority over external affairs, *i.e.*, their relationship with nonmembers of the tribe.⁶ The exercise of sovereignty over nonmembers has been narrowly confined: These cases have established the “general principle” that an Indian tribe’s inherent sovereign powers do not extend to relations between the tribe and nonmembers of the tribe. They recognize exceptions to this general principle only where nonmembers enter into a “consensual relationship” with the tribe or where a nonmember’s conduct imperils vital tribal interests.

⁶ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

At the same time, three cases decided in the last decade upholding a tribe's power to tax contain broad language that, when read uncritically, seem to suggest that tribal taxing authority, unlike other exercises of sovereignty over nonmembers, is presumptively valid.⁷ In fact, in all three cases, the taxes were imposed only against non-members who had entered into the type of "consensual relationship" recognized in other cases as a sufficient basis for the exercise of tribal authority over nonmembers.

The decision below typifies the confusion stemming from the inclination to focus on the language, rather than the actual holding, of the cases upholding a tribe's power to tax nonmembers. In upholding the taxes imposed on BN, the Ninth Circuit failed even to cite any of this Court's decisions establishing the general rule against the exercise of tribal authority over nonmembers. Moreover, the court of appeals explicitly rejected BN's contention that a consensual relationship between the railroad and the tribe was necessary before taxes could be imposed. Instead, it held that the "intangible benefits of a civilized society" and the "tangible benefits of police and fire protection" were a sufficient basis for taxing BN—even though those benefits are received by *all* non-Indians who enter reservation lands for any purpose. The court of appeals also suggested in passing that a consensual relationship could be found in the origins of BN's rights-of-way—even though BN's predecessor received them from the federal government nearly 100 years ago, and even though the Tribes lack the power to exclude BN from the reservation and BN cannot abandon its tracks or operations without federal governmental approval. A broader endorsement of the power of Indian tribes to tax nonmembers is difficult to imagine.

The decision below thus extends the taxing power of tribes over nonmembers far beyond any circumstances

⁷ See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

ever considered by this Court. By repudiating the traditional foundation of tribal taxation—the existence of a consensual relationship between the tribe and the non-member taxpayer—the Ninth Circuit has swept aside the one meaningful check on tribal power to tax non-members. Given the apparent lack of traditional constitutional constraints on discrimination against non-members, tribal taxing power over nonmembers has thus been left virtually boundless.

The implications for this nation's entire railroad industry are significant. BN's rail system, like those of many other major rail carriers, passes through numerous Indian reservations. Its tracks cannot be moved, both as a practical matter and as a matter of ICC regulation over abandonment. If the Ninth Circuit's decision stands, it will open the door to a new tier of taxes imposed on railroads by Indian tribes across the nation. As a result, the burden of tribal taxes—amounting in this case alone to at least \$640,000 per year—is likely to increase dramatically in the very near future.

Nor is the impact limited to the railroad industry. The taxes in this case apply on their face to other utilities—electrical lines, telephone and fiber optic lines, gas and oil pipelines—who are also unlikely to be in a position to remove themselves from the reservation. At least one tax also applies to land held in fee simple by non-Indians. For all of these entities, the validity of nonconsensual taxation by tribal governments in which they have no participation is of critical importance.

I. THIS CASE DEMONSTRATES THE IMPORTANCE OF CLARIFYING THE SCOPE OF AN INDIAN TRIBE'S POWER TO TAX NONMEMBERS

A. This Court's Precedent Has Been Misconstrued As Establishing the Principle that Tribes Have Broad Power to Tax Nonmembers

In a series of cases decided over the past two decades, this Court has recognized a fundamental distinction between the powers of Indian tribes over members and

nonmembers. While affirming the power of tribes to control their internal relations, these decisions establish the "general principle" that tribal sovereignty does not extend to a tribe's external relations with nonmembers. Yet, in three decisions upholding the power of tribes to tax nonmembers, this Court made no mention of this principle and employed broad language in characterizing tribal taxing power. While each of the latter three cases fits squarely within the "consensual relationship" exception to the general rule against tribal regulation of nonmembers, these tax decisions have been misconstrued in the lower courts as establishing a wholly separate principle that tribes have broad authority to tax nonmembers, whether or not a consensual relationship exists.⁸ The scope of a tribe's power to tax nonmembers thus remains in a state of confusion that only this Court can alleviate.

The basic contours of Indian sovereignty were developed early in this Court's history. In several early cases, the Court described Indian tribes as self-governing political entities that retained inherent, but diminished, sovereign powers. These decisions recognized that limitations on the sovereignty of Indian tribes derived not only from treaties or congressional enactments, but by implication as a necessary consequence of the tribes' incorporation into the United States.⁹

⁸ See, e.g., *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984); *Conoco, Inc. v. Shoshone & Arapahoe Tribes*, 569 F. Supp. 801 (D. Wy. 1983); *Navajo Communications Co., Inc. v. Navajo Tax Comm'n*, 18 Indian L. Rep. 6068 (Navajo May 1991); *In the Matter of Protest filed by Railbox Co., Railgon Co. & Trailer Train*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court, (Mar. 19, 1990) aff'd., Pueblo of Acoma Tribal Council (Dec. 14, 1990); see also, *Atchison, Topeka & Santa Fe R.R. v. Bureau of Indian Affairs*, 14 IBIA 46 (1986).

⁹ See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (tribes lack the inherent power freely to alienate their land to non-Indians); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (tribes cannot enter into diplomatic or commercial relations with foreign nations).

In the first modern case squarely to address the measure of sovereignty Indian tribes possess over non-Indians, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that tribes lack criminal jurisdiction over non-Indians absent express delegation from Congress. The Court emphasized that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'" *Id.* at 208 (citation omitted) (emphasis in original).

In *United States v. Wheeler*, 435 U.S. 313 (1978), by contrast, the Court reaffirmed that an Indian tribe retains jurisdiction over crimes committed by its own members. The Court recognized a fundamental distinction between a tribe's "internal" and "external" relations, observing that "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe." *Id.* at 326. This reflected "the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Id.* Powers of self-government, on the other hand, would not necessarily be divested by the tribe's dependent status since they "involve only the relations among members of [the] tribe." *Id.*

The distinction between a tribe's relations with members and nonmembers was reaffirmed in *Montana v. United States*, 450 U.S. 544, 564 (1981):

[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

The Court therefore held that the Crow tribe could not regulate nonmember hunting and fishing on reservation lands no longer owned by the tribe, since such regulation bore "no clear relationship to tribal self-government or internal relations." *Id.* The Court applied the "general

proposition," derived from *Oliphant*, that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565 (footnote omitted).¹⁰ *Montana* thus made explicit what *Oliphant* and *Wheeler* had implied: a tribe generally may not exercise authority over nonmembers.

The Court in *Montana* identified only two exceptions to this general principle. First, "[a] tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members." *Id.* In addition, in some circumstances a tribe may retain the authority to regulate conduct of nonmembers that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* Absent a showing that one of these exceptions applies, a tribe's exercise of authority over nonmembers cannot survive absent "express congressional delegation." *Id.* at 564.

The principle that tribes generally may not regulate the activities of nonmembers received the unequivocal endorsement of the Court in two recent cases. In *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, a plurality of the Court relied on the "general principle" recognized in *Montana* in holding that the Yakima Nation lacked the power to zone nonmember lands in the reservation's "open" area. 492 U.S. 408, 426 (1989). Similarly, in *Duro v. Reina*, 110 S. Ct. 2053 (1990), rendered after the Ninth Circuit's decision in this case, the Court reaffirmed the general rule against tribal regulation of nonmembers in holding that tribes lack criminal jurisdiction not only over non-Indians, but over all Indians who are nonmembers of the tribe as well.

¹⁰ As the Court noted in both *Oliphant* and *Montana*, this principle found early recognition in Justice Johnson's concurrence in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), where he stated that the Indian tribes had lost any "right of governing every person within their limits, except themselves."

Over the past decade, this Court has also upheld on three separate occasions the power of an Indian tribe to tax nonmembers. In the first of these, *Washington v. Confederated Tribes of Colville Indian Reservation*, the Court upheld a tribe's authority to tax nonmembers who voluntarily entered a reservation to purchase cigarettes, observing that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 447 U.S. 134, 152 (1980). While *Wheeler* was cited in support of this proposition, the distinction it drew between a tribe's relations with members and nonmembers went unmentioned. However, in view of the commercial dealings voluntarily entered into by the nonmember cigarette purchasers, the existence of a consensual relationship is apparent.

Two years later, *Colville* provided the primary basis for the holding in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), that a tribe had the power to impose severance taxes on nonmembers extracting tribal oil and gas from reservation lands pursuant to long-term leases with the tribe. Noting that the lessees availed themselves of the "substantial privilege of carrying on business" on the reservation and received tribal services, *id.* at 137, a majority of the Court saw "nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government," *id.* at 138, particularly since the tax revenues were "derived from value generated on the reservation by activities involving the Tribes." *Id.* The majority opinion made no mention of *Montana*'s "general proposition" that inherent tribal sovereignty does not extend to the activities of nonmembers of the tribe. Nor was *Montana* cited in *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), a subsequent decision relying solely on *Merrion* to uphold

a possessory interest and business activity tax imposed on nonmembers extracting minerals from reservation lands pursuant to long-term leases with the Tribes.

These three tax cases did not discuss the principles set forth in *Oliphant*, *Wheeler*, and *Montana*, and used broad language in describing a tribe's power to tax. Yet a careful reading reveals that all three cases fit squarely within the framework established in *Montana* for analyzing inherent tribal sovereignty. In *Montana*, the Court recognized that “[a] tribe may regulate through taxation . . . the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565 (emphasis added). In each tax case, the nonmembers held subject to tribal taxing power were on the reservation pursuant to “commercial dealing” and “leases” with the tribe—precisely the type of “consensual relationships” recognized in *Montana* as supporting the exercise of tribal taxing authority over nonmembers.

This suggested reconciliation of the two lines of cases finds substantial support in *Brendale*, where the plurality explicitly reconciled *Colville* and *Montana*, citing the former as “an example of the sort of ‘consensual relationship’ that might even support tribal authority over non-members on fee lands.” *Brendale*, 492 U.S. at 427.¹¹ Moreover, in reaching its decision, the plurality retraced much of the Court’s sovereignty jurisprudence (includ-

¹¹ *Montana* itself makes clear that *Morris v. Hitchcock*, 194 U.S. 384 (1904), and *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), two cases cited in *Colville* as recognizing the power of tribes to tax nonmembers, also fit within the “consensual relationship” exception. See *Montana*, 450 U.S. at 565-66. The same is true of *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation*, 259 F.2d 553 (8th Cir. 1958) *cert. denied*, 358 U.S. 932 (1959), cited in *Colville* and *Merrion*, each of which relied on the Eighth Circuit’s previous decision in *Buster v. Wright* to uphold the taxation of nonmembers leasing tribal lands for grazing.

ing *Merrion* and *Colville*) without suggesting any distinction between the principles governing the analysis of tribal taxing power and the exercise of tribal sovereignty in other regulatory contexts.

Brendale thus strongly suggests that the general rule recognized in *Montana* proscribing the exercise of tribal authority over nonmembers extends to *all* civil regulatory affairs, including tribal taxation. However, perhaps because of the lack of opinion for the court in *Brendale*, this message has not been clearly understood by any of the authorities responsible for reviewing tribal taxing power —federal courts, tribal courts and councils, or the BIA. As a result, the misconception persists that a tribe's power to tax nonmembers, unlike the exercise of tribal authority in other contexts, does not require a consensual relationship. This case presents the opportunity to remedy that misunderstanding, and to clarify as well what must be shown to establish a “consensual” relationship sufficient to permit tribal regulation of nonmembers.¹²

¹² This case also provides an ideal vehicle for clarifying a second question left open in *Brendale*, namely, what role a tribe's “power to exclude” plays in evaluating the limits on tribal authority over nonmembers. In *Merrion*, a majority of the Court rejected the argument advanced by three dissenting justices that the power to exclude was the *sole* basis for tribal taxing authority over nonmembers. Yet in *Brendale*, the plurality concluded that since the Yakima Nation could no longer exclude nonmembers from significant portions of the reservation, the power to exclude could not serve as the source of some lesser power to regulate the activities of those non-members on reservation lands. 492 U.S. at 422-25. Furthermore, Justice Stevens (joined by Justice O'Connor) relied exclusively on his analysis of a tribe's power to exclude in deciding that the Yakima Nation could zone nonmembers residing in the “closed” area of the reservation, but lacked such authority in the “open” area. *Brendale*, 492 U.S. at 445 (Stevens, J., concurring).

Here, BN enjoys the *exclusive* use and occupancy of its rights-of-way, and the Tribes lack the power to exclude BN from the reservation. The Ninth Circuit, relying solely on *Merrion*, found this irrelevant. App. at 11a-13a. Yet both the plurality and concurring opinions in *Brendale* suggest that it should have been a significant consideration in the court's analysis.

B. The Decision Below Exemplifies the Confusion Concerning the Scope of An Indian Tribe's Power to Tax Nonmembers

The Ninth Circuit's decision in this case exemplifies the confusion that exists concerning the scope of tribal taxing power over nonmembers. The Ninth Circuit held that Indian tribes could tax BN's rights-of-way without addressing, even in passing, the long line of this Court's decisions limiting the exercise of tribal authority over nonmembers. Indeed, neither of the opinions below contains a single citation to this Court's decisions in *Oliphant*, *Wheeler*, *Montana*, or *Brendale*.¹³

Under those decisions, absent express congressional delegation,¹⁴ the assertion of tribal sovereignty over a nonmember is permissible only if one of two exceptions applies: (1) where nonmembers have entered "consensual relationships with the tribe or its members," *Montana*, 450 U.S. at 565, or (2) where nonmember conduct within reservation boundaries imperils "the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

Consensual relationships were defined in *Montana* as "commercial dealing, contracts, leases, and other arrangements." *Id.* at 565. The only reasonable inference to draw from this illustrative list is that a consensual relationship exists when the nonmember's presence on the

¹³ Although the district court did not have the benefit of this Court's opinion in *Brendale*, that decision was explicitly brought to the attention of the court of appeals.

¹⁴ No acts of Congress have expressly delegated to the tribes the authority to tax nonmembers. The Indian Reorganization Act of 1934, which authorized Indian tribes to adopt Constitutions and enumerated specific powers that would vest therein, makes no reference whatsoever to the power to tax. *See, e.g.* 25 U.S.C. § 476 (1988). Thus, even though the tribal taxes challenged here were approved by the Area Director of the BIA, this cannot constitute the "express congressional delegation" *Montana* requires to overcome the presumption against tribal regulation of nonmembers.

reservation is the result of a direct and significant business relationship with a tribe. In this case, the record is devoid of any evidence that would support a finding that such a relationship exists between BN and the Tribes. BN operates through the reservations pursuant to federally-granted rights-of-way its predecessor obtained without seeking the consent of the Tribes. Moreover, neither BN nor the Tribes has the power to decide whether the rights-of-way should be abandoned or operations terminated. Those decisions are the exclusive province of the Interstate Commerce Commission.¹⁵ In short, BN's operations on its rights-of-way were not at the outset and are not now the product of any consensual relationship between BN and the Tribes.

Nor can the taxes imposed here possibly qualify under *Montana*'s second exception. The plurality in *Brendale* significantly limited the scope of this exception, holding that it applies only where the nonmember activities affect a federally-protected interest of the tribe and the impact of those activities is "demonstrably serious and . . . imperil[s] the political integrity, the economic security, or the health and welfare of the tribe." 492 U.S. at 431. The record in this case contains no showing that BN's rights-of-way or its operations along those rights-of-way could conceivably have such deleterious effects on the Tribes.

Rather than applying this framework, the Ninth Circuit assessed the validity of the ordinances at issue solely by reference to the decisions in *Colville* and *Merrion*, cases where the taxpayer voluntarily had entered into a consensual relationship with a tribe. Misinterpreting those decisions, the court of appeals rejected BN's con-

¹⁵ See, e.g., *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (ICC power over abandonments is plenary and exclusive); *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 144 (1945) (ICC's authority over abandonments extends to operations commenced prior to enactment of statute vesting ICC with jurisdiction).

tention that a similar consensual relationship with the Tribes was required here, reasoning: "The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to the control by the Tribes but whether Burlington Northern receives benefits from the Tribes for which it may be taxed." App. at 11a (footnote omitted). The railroad's alleged receipt of "the intangible benefits of a civilized society," and "the tangible benefits of police and fire protection," were viewed as a sufficient basis for taxation. App. at 10a.

Under this analysis it is difficult to imagine a tribal tax ever being held invalid, since *all* on-reservation activities—even those occurring on nontribal lands and involving only nonmembers of the tribe—presumably would receive such benefits. Such a rule would in effect resurrect the Ninth Circuit's reasoning in *Brendale* that a tribe's inherent sovereignty is coextensive with a local government's police power, a notion explicitly rejected by a plurality of the Court as contrary to *Montana*. See *Brendale*, 492 U.S. at 429.

The court of appeals observed in a footnote that even "[i]f a consensual relationship was necessary, the Tribes consented to railroad rights of way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for rights of way." App. at 11a n.7. The suggestion that two parties have a consensual relationship because over 100 years ago their predecessors contracted independently with the same third party is, to say the least, a strange notion of "consent." By the Ninth Circuit's reasoning, a nonmember property owner whose predecessor-in-interest had homesteaded, under federal law, a tract of land ceded by a tribe to the United States would have a "consensual relationship" with the tribe merely because the homesteaded land had once belonged to Indians. Such a conclusion not only runs

counter to common sense, but was explicitly rejected by the plurality in *Brendale* as well. 492 U.S. at 428.

As a practical matter, therefore, the decision below divorces a tribe's taxing power entirely from its historical foundation—the existence of a consensual relationship between the nonmember taxpayer and the tribe. The court of appeals reached this result largely in reliance on a superficial reading of this Court's decisions in *Colville* and *Merrion* that failed to take into account their actual holdings.

The Ninth Circuit quoted *Colville* for the proposition that “[t]ribes retain the authority ‘to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.’” App. at 10a (quoting *Colville*, 447 U.S. at 153). Though this rather general statement was not the holding in *Colville*, it became the lodestar for the Ninth Circuit’s analysis. The court of appeals focused initially on whether the Tribes retained any property interest in BN’s rights-of-way.¹⁶ App. at 9a-10a. Concluding that they did, the only question remaining was whether the Tribes had a “significant interest in the subject matter [taxed].” App. at 10a.

The court of appeals found the significant interest requirement met in part because “Burlington’s activities

¹⁶ As BN argued in the court below, the Tribes have never had any property interest in its rights-of-ways that would justify the taxes imposed here. The Tribes do not currently have and have never had the power to exclude BN from reservation lands. Moreover, whether the railroad’s interest is viewed as a “limited fee,” as was the case for the first half of this century, (see *Rio Grande W. R.R. v. Stringham*, 239 U.S. 44 (1915)), or as an “easement,” as more recent decisions have held (see *Great N. R.R. v. United States*, 315 U.S. 262 (1942)), it plainly includes the right to “exclusive use and possession” for so long as the railroad continues its operations. See *Wyoming v. Udall*, 379 F.2d 635 (10th Cir.) cert. denied, 389 U.S. 985 (1967); *Idaho v. Oregon S. L. R.R.*, 617 F. Supp. 207 (D. Idaho 1985). Since the Tribes also have no more than a beneficial interest in trust lands, it is difficult to see how their interest can justify a tax on the railroad’s separate and exclusive interest.

involve use of tribal lands.” *Id.* By equating “activities [that] involve use of tribal lands,” with a “significant interest,” however, the court of appeals’ analysis reduces to mere tautology: a tribe can tax “the activities . . . of non-Indians taking place . . . on Indian lands,” in those cases where “activities involve use of tribal lands.” *Id.* This reasoning renders the “significant interest” inquiry completely meaningless and, in the process, reaches a result that finds no support in the *Colville* decision.

The Ninth Circuit also found the requisite “significant interest” in petitioner’s purported receipt of tribal services. App. at 10a. Here too, however, the Ninth Circuit ignored the circumstances under which the receipt of tribal services was found to support tribal taxation in *Colville* and *Merrion*. In each case, this Court recognized that “the tribe’s interest in levying taxes on nonmembers to raise ‘revenues for essential governmental programs . . . is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services.’” *Merrion*, 455 U.S. at 138 (emphasis added) (quoting *Colville*, 447 U.S. at 156-157). And, in each case, the tribes were involved as partners in commercial ventures generating value on the reservation. “Under these circumstances, there [was] nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.” *Merrion*, 455 U.S. at 138 (footnote omitted). Here, in contrast, BN merely conducts a segment of its interstate transportation operations through the reservations on rights-of-way granted by the federal government for just such use a century ago. BN’s operations do not “involve the Tribes” merely by virtue of the Tribes’ beneficial ownership in reservation lands.

By misconstruing *Colville* and *Merrion*, the Ninth Circuit has endorsed a view of tribal taxing authority fundamentally at odds with the limited concept of Indian sovereignty over nonmembers recognized in *Montana* and

affirmed in *Brendale*. The Ninth Circuit's failure to evaluate the taxes imposed on petitioner within the framework established in *Montana* has created a precedent that effectively expands tribal taxing power over nonmembers well beyond that sanctioned in the prior decisions of this Court. Contrary to *Montana* and *Brendale*, the decision below creates a virtually irrebuttable presumption *in favor of* tribal taxation of nonmembers. Moreover, by holding that a consensual relationship is not a prerequisite to tribal taxation of nonmembers, the court of appeals has swept aside perhaps the only meaningful limitation on the exercise of such authority.

II. THE DECISION IN THIS CASE HAS NATION-WIDE IMPLICATIONS

A. The Decision Below Will Encourage Indian Tribes to Impose Discriminatory Taxes Against Non-members

By rejecting the contention that a consensual relationship is necessary before a tribe can impose taxes against nonmembers, the Ninth Circuit has eliminated a critical restraint on tribal authority, and in the process, opened the door to virtually unlimited tribal taxation. This Court has recently observed,

[w]ith respect to such internal laws and usages, the tribes are left with broad freedom not enjoyed by any other governmental authority in this country . . . This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.

Duro, 110 S. Ct. at 2064 (citations omitted).

The need for some form of consent is particularly apparent with respect to tribal taxation of nonmembers. The insight that inspired the founding of our Republic was that taxes would be fair only if imposed by the elected representatives of the taxpayers. State and local governments are precluded from imposing taxes paid ex-

clusively or predominantly by nonvoting citizens of other jurisdictions by both the Equal Protection Clause of the Fourteenth Amendment¹⁷ and the anti-discrimination principles of the Interstate Commerce Clause.¹⁸

Indian tribes do not face the same constraints with regard to the taxing of nonmembers. As the Court has recognized, for example, tribes are effectively unconstrained by the equal protection components of the Fifth and Fourteenth Amendments, which limit the discriminatory exercise of federal and state authority.¹⁹ Similarly, this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), renders uncertain the viability of any Commerce Clause limitations on tribal regulation of nonmembers. In the absence of such fundamental protections, grounding tribal regulation of nonmembers in a consensual relationship provides perhaps the only real measure of restraint on tribal taxing power.

A consensual relationship not only legitimizes the exercise of tribal power in that tribal authority "rests on consent," *Duro*, 110 S.Ct. at 2064, but also provides practical limitations on the unduly burdensome exercise of that power. A nonmember who is considering whether to enter into a consensual relationship with a tribe can make a calculation as to whether the potential burdens of taxation are outweighed by the economic benefits of the transaction. If tribal taxes are perceived as too high,

¹⁷ See, e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985).

¹⁸ See, e.g., *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

¹⁹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978); *Duro*, 110 S.Ct. at 2064. While Congress has extended certain provisions of the Fourteenth Amendment to tribal governments through the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1988), the decision in *Santa Clara Pueblo* foreclosed their enforcement except in tribal court.

nonmembers will choose not to do business with the tribe —a disincentive to excessive taxation of nonmembers. Such a choice is, however, unavailable to a nonmember who, like petitioner, has no consensual relationship with the tribe, gained the right to enter reservation lands from the federal government nearly 100 years ago, and may not of its own volition cease transporting interstate commerce through the reservation.

The need for a requirement of consent with regard to taxation is especially critical at this juncture in the evolution of tribal economic development. Internal demands for tribal revenue have increased dramatically in recent years. As a result, tribal governments increasingly are relying on taxation to raise revenues. Effectively unchecked by Commerce Clause or Equal Protection limitations, there is a great temptation for tribes to impose taxes directed only at nonmembers of the tribe, who are powerless to protest their imposition through participation in tribal government. The taxes imposed against BN in this case exemplify this dangerous trend.

The Blackfeet Possessory Interest Tax, for example, though broadly drafted to encompass any interest in real property within the reservation boundaries, app. at 64a, conspicuously exempts all residential and commercial property, governmental entities, and utilities that exclusively serve the reservation. App. at 66a-67a. Virtually the only property the tax does not exempt consists of “[u]tility lines passing through the reservation and providing service beyond the Reservation boundaries.” App. at 66a. This, of course, was precisely the point. As a study of the proposed tax commissioned by the Blackfeet Tribe observed: “[w]ith few exceptions the property that would be subject to the Possessory Interest Tax are owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation.” App. at 70a.

The Fort Peck "Utilities Tax" shares this attribute. Because it is addressed to utilities, it avoids burdening local tribal businesses and residential property. It expressly exempts all tribal entities and property, as well as any utility whose on-reservation property is valued at less than \$200,000. App. at 60a. In addition, the tax provides a preferential rate for cooperative utilities serving the reservation. App. at 58a. Finally, like its Blackfeet counterpart, the Fort Peck tax exempts other governmental entities who, because of their position, might be able to exert some leverage with the tribe, either by imposing taxes of their own or through some other means. App. at 60a.

It is thus difficult to escape the conclusion that BN and other nontribal entities were singled out for these taxes precisely because they engage in interstate commerce passing through the reservation, have facilities that cannot readily be relocated, and have no direct say in tribal affairs. Tying tribal taxing power to the existence of a true consensual relationship offers some protection against such overt discrimination. If the decision below stands, however, even this minimal check on tribal taxing power will be lost.

B. The Decision Below Threatens to Have a Significant Adverse Impact on the Financial Condition of this Nation's Railroads

The implications of the decision below for this nation's railroad industry are significant. Rail lines, particularly in the West, pass through numerous Indian reservations. If the Ninth Circuit's decision stands, railroads will be exposed for the first time to a new layer of taxes imposed by Indian tribes. This tax burden is likely to grow substantially as additional tribes seize upon any railroad that happens to cross their reservations as a convenient revenue source. The result will be yet another impediment to the efforts—fully endorsed by Congress—to revitalize the economic well-being of the nation's rail system.

Some measure of the scope of the potential impact of tribal taxation on the railroad industry can be gained by reviewing the situation faced by just a few of the large interstate rail carriers. Petitioner BN, for example, which provides rail service in 22 states, has rights-of-way crossing 27 separate Indian reservations. In addition to the tax liability imposed by the Blackfeet and Fort Peck Tribes, BN is already facing additional taxation pursuant to an ordinance recently passed by the Crow Tribe, once that ordinance is submitted and approved by the BIA.²⁰

Nor is BN alone. The Atchison, Topeka & Santa Fe Railway is currently subject to possessory interest or general business taxes imposed by seven different reservations.²¹ Similarly, the Shoshone-Bannock Tribe of the Fort Hall Reservation and the Three Affiliated Tribes of the Fort Berthold Reservation have just amended their tribal tax codes to impose on the Union Pacific Railroad and the Soo Line Railroad, respectively, possessory interest taxes similar to those imposed on petitioner in this case.²² And the Southern Pacific Railroad Company, whose severe financial difficulties have recently drawn the attention of Congress,²³ has been subjected to attempts by the Pueblo de Acoma to assess a property tax on its railcars moving through the Pueblo on the tracks of another railroad.

That the potential exists for significant tribal taxation of railroads is thus very clear: The five rail carriers

²⁰ Crow Tribe Utilities Tax Ordinance (proposed).

²¹ Challenges to these taxes in tribal forums and before the Bureau of Indian Affairs have been rejected, largely on the basis of this Court's decision in *Merrion*. See e.g., *Atchison, Topeka & Santa Fe R.R. v. Bureau of Indian Affairs*, 14 IBIA 46 (1986).

²² See Tribal Tax Code of the Shoshone-Bannock Tribes §§ 701-723 (April 1991); Tribal Tax Code of the Three Affiliated Tribes of the Fort Berthold Reservation §§ 701-722 (Dec. 1990).

²³ See 137 Cong. Rec. H2369 (daily ed. Apr. 17, 1991) (statement of Mr. Slattery).

referred to above alone cross over 56 different Indian reservations. Nor can it be seriously questioned that the liability arising from tribal taxation could be a substantial financial burden on the railroads. BN's tax bill in this case alone—currently over \$640,000 per year—represents the liability for a relatively small stretch of track running across just two Indian reservations, on which it pays state and local taxes as well.

Moreover, the manner in which the Fort Peck Tribes set their tax rate in this case provides little comfort that the level of taxation imposed on railroads will be guided by a sense of reasonableness or proportionality. By all accounts, the 3 percent tax rate was chosen simply because it would produce sufficient tax revenues to erase the Tribes' budget shortfall, evidently about \$1.3 million. *Affidavit of Lawrence D. Wetsit ¶ 4; Ryan Aff. ¶¶ 17-18* (Apr. 2, 1987). It thus seems likely that as tribes determine a need for greater tax revenues in the future, they will simply increase the tax rate on BN and other railroads, rather than expanding the tax base. The decision below thus creates a blueprint for tribal taxation that could lead to additional tax liabilities for the nation's railroads surpassing tens of millions of dollars annually.

Such a result directly undermines the declared national objective of strengthening the economic viability of this country's railway system. Over the past fifteen years, Congress has expressed significant concern with the precarious financial health of U.S. railroads, and enacted comprehensive legislation designed to improve their economic condition.²⁴ By sanctioning yet another financial burden on the railroad industry, the decision below has dealt Congress's goal of rejuvenating the nation's rail system a serious setback.

²⁴ See, e.g., Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

C. The Decision Below Carries Implications for Other Interstate Carriers As Well As Owners of Fee Property Within Reservation Boundaries

The impact of the decision below is not limited to the railroad industry. The taxes in this case apply to "any privately or publicly held entity engaged in supplying, transmitting, or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services." App. at 65a; *see also* App. at 57a. Moreover, the burden of these taxes is borne almost entirely by utilities engaged in interstate commerce, since those serving the reservation are either exempt from the tax altogether or subject to a preferential rate. App. at 66a; App. at 60a.

With respect to tribal taxation, interstate utilities—oil and gas pipelines, long distance telephone and fiber optic lines, and electric power lines—are in precisely the same "captive" position as railroads. Practical or legal limitations or both prevent them from removing themselves from the reservation, a fact whose significance was not lost on the Tribes:

The cost associated with moving installed pipeline, electric transmission or telephone lines *or* the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Possessory Interest Tax has considerable stability and predictability over time.

App. at 69a-70a. Interstate utilities also pose an enticing target for taxation because "most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation." App. at 70a. For utilities then, no less than railroads, the validity of nonconsensual taxation by tribal governments in which they have no participation is therefore of critical importance.

The Ninth Circuit's holding carries even broader implications. One of the taxes upheld below applies on its face to all possessory interests, including land held by

non-Indians in fee simple within reservation boundaries. App. at 65a. While the court of appeals did not specifically validate this aspect of the tax, its decision would appear to foreshadow such a result.²⁵

Nor is the Blackfeet tribe alone in assuming that its taxing power encompasses fee lands held by nonmembers. The Pueblo of Acoma Tribal Court, for example, has observed that “[tax] jurisdiction lies with Acoma as a government and not as a landowner.”²⁶ On this rationale, the tribal court held that it would have jurisdiction to tax a railroad right-of-way even if held in fee simple by the railroad, a view endorsed by the tribal council on appeal. Similarly, the recently adopted Possessory Interest Tax of the Three Affiliated Tribes of the Fort Berthold Reservation applies to all fee simple lands within reservation boundaries.

In view of the Ninth Circuit’s overwhelming importance on questions of Indian law, the confused state of the law on this issue will undoubtedly persist absent definitive guidance from this Court. Of the 280 Indian reservations in this country, 170 are located within the jurisdiction of the Ninth Circuit.²⁷ Decisions in that circuit

²⁵ Indeed, in its amicus brief in this case the Justice Department, noting the “benefits” conferred by the Tribe, argued:

Even without a direct property interest in the land underlying Burlington Northern’s right of way, these services, costs, and advantages provide an independently sufficient nexus for the tribal tax in this case.

Brief of United States at 11. This reasoning, in particular, creates the prospect of taxation for farmers, ranchers and other fee simple owners.

²⁶ *In the Matter of Protest filed by Railbox Co., Railgon Co. & Trailer Train*, Nos. CV-87-54, 55 & 56, Pueblo of Acoma Tribal Court at 17 (Mar. 19, 1990) *aff’d*, Pueblo of Acoma Tribal Council (Dec. 14, 1990).

²⁷ See *The World Almanac and Book of Facts*, 394 (1991). By way of contrast, the states comprising the Eighth and Tenth Circuits contain 27 and 36 reservations, respectively. *Id.*

on issues of Indian law thus carry far greater practical significance than decisions of any other court of appeals. The substantial precedential effect of the decision below argues strongly in favor of immediate Court review.

Moreover, the court below is not alone in its confusion. Other panels of the Ninth Circuit, district courts, tribal forums and the BIA have all been inclined to apply the tax cases uncritically, viewing them as a line of precedent wholly distinct from this Court's broader sovereignty jurisprudence.²⁸ That tribal courts are also taking an expansive view of tribal power to tax nonmembers is particularly important because many tax ordinances purport to require that any challenge must be brought in the first instance in tribal courts—and only a decision of this Court expressly defining the limits of their jurisdiction to tax nonmembers can be expected to restrain their assertion of broad taxing power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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²⁸ See, e.g., cases cited *supra*, p. 14 n.7.

APPENDICES



APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 88-4428, 88-4429

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESER-
VATION; BLACKFEET TRIBAL BUSINESS COUNCIL; BLACK-
FEET TAX ADMINISTRATION DIVISION; EARL OLD PER-
SON, CHAIRMAN; ARCHIE ST. GODDARD, VICE-CHAIR-
MAN; MARVIN WEATHERWAX, SECRETARY; ELOISE C.
COBELL, TREASURER,
Defendants-Appellees.

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION, ASSINIBOINE & SIOUX TRIBES of the
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
TRIBAL CHAIRMAN; PAULA BRIEN, TRIBAL SECRETARY/
ACCOUNTANT,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana

Argued and Submitted Jan. 8, 1990

Decided Jan. 25, 1991

As Amended March 18, 1991

Before KOELSCH, BROWNING and BEEZER, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

Burlington Northern Railroad brought suit against the Blackfeet, Assiniboine and Sioux Tribes ("Tribes"), their governing bodies and various tribal officials, seeking a declaration that the Tribes lacked sovereign power to tax Burlington Northern's on-reservation rights of way, and an injunction against the imposition of such taxes.¹ The district court denied the Tribes' motion to dismiss on the ground of sovereign immunity, but granted the Tribes' motion for summary judgment on the merits. We grant dismissal of the Tribes and the governing bodies of Tribal officials acting in their official capacities as immune from suit. We affirm the grant of summary judgment.

I

In late 1886 and early 1887, the United States and the Tribes entered into an agreement creating the Blackfeet, Fort Peck and Fort Belknap Reservations, substantially as they are today. This agreement was ratified and codified by Congress on May 1, 1888, 25 Stat. 113 ("Act of 1888"). Article VIII of the agreement, incorporated in the statute, provides:

It is further agreed that, whenever in the opinion of the President the public interests require the

¹ Burlington Northern originally brought two suits: one against the Blackfeet Tribe and the other against the Assiniboine and Sioux Tribes. The district court decided the cases together (*see Burlington N. R.R. v. Fort Peck Tribal Executive Bd.*, 701 F.Supp. 1493 (D. Mont.1988)) and we consolidate them on appeal.

construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe, the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Art. VIII, 25 Stat. at 115-16.

The parties agree that in 1887, after the agreement was signed but before its ratification, Congress granted Burlington Northern's predecessor-in-interest right of way through what would become the Fort Peck Reservation, occupied by the Assiniboine and Sioux Tribes. See Act of February 15, 1887, 24 Stat. 402 ("Act of 1887"). Pursuant to § 4 of the Act, the Secretary of the Interior fixed the terms and conditions of the right of way and the railroad paid the required compensation. The parties further inform us that in 1980 [sic] Burlington Northern's predecessor was granted a similar right of way across the Blackfeet Reservation.

In late 1986 the Blackfeet Tribe imposed a tax on all non-exempt possessory interests within the boundaries of the Blackfeet Reservation. In early 1987 the Assiniboine and the Sioux Tribes imposed a tax on all non-exempt utility property within the boundaries of the Fort Peck Reservation. Both taxes were approved by the Secretary of the Interior in 1987. Both apply by their terms to Burlington Northern's rights of way. Burlington Northern challenges both.

II

The Tribes contend this suit is barred by the Tribes' sovereign immunity.² We decide this issue *de novo*. See

² The Tribes also contend the suit should be dismissed for failure to exhaust tribal and administrative remedies. Although the Tribes

Pan Am. Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 418 (9th Cir.1989).

Indian tribes and their governing bodies possess common-law immunity from suit. They may not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by the tribe or abrogation of tribal immunity by Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S.Ct. 1670, 1676-77, 56 L.Ed.2d 106 (1978). Neither exception applies here.³

failed to cross-appeal from the district court's denial of their motion to dismiss on these grounds, they may "urge on appeal, without taking a cross-appeal, any matter on the record to support the judgment rendered below." *United States v. 101.80 Acres of Land*, 716 F.2d 714, 727 n. 24 (9th Cir.1983). Burlington Northern's failure to exhaust is not a bar to jurisdiction, *see Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n. 8, 107 S.Ct. 971, 976 n. 8, 94 L.Ed.2d 10 (1987), and the district court did not abuse its discretion by reaching the merits. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229 (9th Cir.1989) (prudential exhaustion subject to abuse of discretion standard). The complaint presents issues of federal, not tribal, law; no proceeding is pending in any tribal court; the tribal court possesses no special expertise; and exhaustion would not have assisted the district court in deciding federal law issues. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857, 105 S.Ct. 2447, 2454, 85 L.Ed.2d 818 (1985).

³ The Tribes are immune from suit even though the complaints allege the *Tribe*s acted beyond their authority, *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985), and even though Burlington Northern seeks only "affirmative" relief. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677 ("Nothing on the face of [the Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir.1985) (suit for declaratory and injunctive relief, as well as damages, barred by tribal immunity); *see also Chemehuevi*, 757 F.2d at 1052 n. 6 ("[tribal] sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation").

But sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 156-57 n. 6, 98 S.Ct. 988, 993-94 n. 6, 55 L.Ed.2d 179 (1978); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 690 & n. 22, 69 S.Ct. 1457, 1461 & n. 22, 93 L.Ed. 1628 (1949); *Ex parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 453-54, 52 L.Ed. 714 (1908). No reason has been suggested for not applying this rule to tribal officials, and the Supreme Court suggested its applicability in *Santa Clara Pueblo*, 436 U.S. at 59, 98 S.Ct. at 1677. We strongly implied, without deciding, that *Ex parte Young* does apply to tribal officials in *Chemehuevi Indian Tribe v. Calif. Bd. of Equalization*, 757 F.2d 1047, 1051-52 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) and *California v. Harvier*, 700 F.2d 1217, 1218-20, 1220 n. 1 (9th Cir.1983). We now reach the issue, and conclude that tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Harvier*, 700 F.2d at 1221, 1224 (Norris, J., dissenting). Accordingly, tribal officials are not immune from suit to test the constitutionality of the taxes they seek to collect. *Tenneco Oil Co. v. Sac and Fox Tribe of Indians*, 725 F.2d 572, 574 (10th Cir. 1984); *Wisconsin v. Baker*, 698 F.2d 1323, 1332-33 (7th Cir.1983).

The Assiniboine and Sioux Tribes concede this. The Blackfeet Tribe contends their officials are not amenable to suit, relying on *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir.1986), and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). But *Yakima* and *Hardin* hold only that tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their *valid* authority. See *Larson v. Domestic & Foreign Commerce*

Corp., 337 U.S. at 695, 69 S.Ct. at 1464 ("if the actions of an officer do not conflict with the terms of his *valid* statutory authority, then they are the actions of the sovereign [which] . . . cannot be enjoined or directed") (emphasis added); *accord Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir.1983); *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir.1982).⁴

III

We turn to the merits. "[T]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 102 S.Ct. 894, 901, 71 L.Ed.2d 21 (1982) (quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10 (1980)). Burlington Northern contends the Tribes lacked the power to impose the challenged taxes because: (A) the rights of way are not on trust lands, (B) Burlington Northern's activities within the boundaries of the reservations do not significantly involve the Tribes, and (C) the Tribes have been divested of their sovereign power to tax. We address each contention in turn.

A

The Acts of 1874 and 1888 set aside reservation lands for the "use and occupation" of the Tribes. Burlington Northern argues this phrase limits the Tribes' rights to those directly related to use and occupation of the land,

⁴ *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 172-73, 97 S.Ct. 2616, 2621, 53 L.Ed.2d 667 (1977), in contrast, involved a suit against tribal officials based on their rights and obligations as individuals.

and this interest is not sufficient to support the right to tax. As the Supreme Court has long held, however, "the right of occupancy with all its beneficial incidents [is] . . . as sacred as the fee." *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 115, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938); *accord United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345, 62 S.Ct. 248, 251, 86 L.Ed. 260 (1941); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745, 9 L.Ed. 283 (1835). Although the United States technically "owns" reservation lands, holding them in trust for the Tribes, *see, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175, 109 S.Ct. 1698, 1707, 104 L.Ed.2d 209 (1989), the Tribes retain "beneficial ownership." *See Shoshone Tribe*, 304 U.S. at 116-18, 58 S.Ct. at 797-98. The Tribes' interest includes all rights normally associated with "fee simple absolute title," *id.* at 117, 58 S.Ct. at 798, and may be diminished only by clear expression of congressional intent. *See, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48, 105 S.Ct. 1245, 1258-59, 84 L.Ed.2d 169 (1985).

No intent to transfer the Tribes' interest in the land except as necessary for use as a right of way is reflected in the grants to Burlington Northern.⁵ As earlier noted, the right of way across the Blackfeet and Fort Peck Reservations was granted by Congress in the Act of 1887. As Burlington Northern itself urges, the language of the Act of 1887⁶ is substantially similar to that found

⁵ Burlington Northern argues that an easement for construction and operation of a railroad was necessarily exclusive, and therefore precluded any use and occupancy remaining in the Tribes. This is equivalent to the argument rejected in *Merrion*, 455 U.S. at 137, 102 S.Ct. at 901, that the Tribes' power to tax derives solely from the power to exclude. The grant of an exclusive easement did not extinguish the Tribes' title. *United States v. Soldana*, 246 U.S. 530, 532-33, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918).

⁶ The Act of 1887 provides:

[Sec. 1.] . . . That the right of way is hereby granted, as hereinafter set forth, to [Burlington Northern's predecessor-in-inter-

in the Act of March 3, 1875, 18 Stat. 482, which granted railroads rights of way across public lands other than lands within Indian reservations. The Supreme Court has held the latter act "clearly grants only an easement, and not a fee," *Great N. Ry. v. United States*, 315 U.S. 262, 271, 62 S.Ct. 529, 532, 86 L.Ed. 836 (1942)—conveying no "more than a right of passage." *Id.* at 275, 62 S.Ct. at 534. The reasons upon which the Supreme Court relied apply equally to the Act of 1887. The Act of 1887, like the Act of 1875, granted, "the, not a, 'right of way.'" *Id.* at 271, 62 S.Ct. at 532. The Act of 1887 speaks of a right of way passing "across" the reservations; the Act of 1875 spoke of rights of way as passing "over" public land. *Id.* at 271-72, 62 S.Ct. at 532-33. The Act of 1887, like the Act of 1875, was enacted in a period in which public policy had shifted against "outright grants of public lands to private railroad companies." *Id.* at 274, 62 S.Ct. at 534. Burlington Northern's argument that the grant in the Act of 1887 was "*in praesenti*" and therefore vested immediately is not persuasive; the issue is not when the grant vested, but

est], for the extension of its railroad through [what is now the Blackfeet and Fort Peck Reservations].

Sec. 4. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until . . . the compensation aforesaid has been fixed and paid . . . and the . . . operation of such railroad shall be conducted . . . in accordance with such . . . regulations as the Secretary of the Interior may make . . .

Sec. 5. That the right of way across lands occupied or reserved for military purposes along the line of said railroad is hereby granted to said company the same as across said Indian reservations. . . .

rather what rights it included when it did vest. In sum, we see no reason to interpret the Act of 1887 as granting the railroads a greater interest than did the Act of 1875.

This interpretation is strengthened by Section 5 of the Act of 1887, which provides "the right of way across lands occupied or reserved for military purposes . . . is hereby granted to said company the same as across said Indian reservations." It is unlikely Congress after granting the railroads only an easement across unoccupied public lands in the Act of 1875, as the Supreme Court has held Congress did, *Great N. Ry. Co. v. United States*, 315 U.S. at 275, 62 S.Ct. at 534, would have granted the railroads a right of way in fee simple across reservation and hence military lands two years later in the Act of 1887. *Cf. id.*

Burlington Northern argues the grant of rights of way completely extinguished the Tribes' interest in the land because Burlington Northern's predecessor-in-interest was required to pay the Tribes compensation. But compensation is equally consistent with a grant of an easement or a fee, and weighs in favor of neither.

Burlington Northern argues that Congress, by the Act of 1887, had already granted Burlington Northern right of way across the reservations before Congress ratified the earlier agreements with the Tribes, by adopting the Act of 1888 establishing the reservations' boundaries. Thus, the Tribes had no property interest left in the right of way to which the Act of 1888 could apply. However, the agreement embodied in the Act of 1888 was signed by the Tribes and representatives of the United States before the Act of 1887 was passed. The language of the Act of 1887 closely tracks that of the agreement, and the legislative history clearly indicates Congress passed the Act with the agreement, and particularly Article VIII, in mind. See H.R. Rep. No. 3487, 49th Cong., 2d Sess. 2 (1886); *Burlington Northern*, 701 F.Supp. at 1501-02; *cf. Clairmont v. United States*, 225 U.S. 551, 556, 32

S.Ct. 787, 788, 56 L.Ed. 1201 (1912) (Indian tribes surrendered in writing “‘all the right, title, and interest’” in the railroad rights of way they may have had by virtue of earlier treaties). Acts of Congress will not be construed to extinguish Indian property or treaty rights unless that intent is clearly and plainly expressed. *E.g.*, *County of Oneida*, 470 U.S. at 247-48, 105 S.Ct. at 1258-59. Congress did not say it intended to abrogate the Tribes’ property interests when it passed the Act of 1887, and we are not persuaded Congress did so.

Burlington Northern’s argument that the Act of 1888 simultaneously extinguished the Tribes’ rights in the land within the right of way across the reservations while granting them to the railroad merely restates arguments we have already rejected. We find no clear expression Congress intended the Act of 1888 to extinguish the Tribes’ property interest.

The Tribes’ power to tax nonmembers derives from the Tribes’ continuing property interest. Like the continuing property interest in the leases at issue in *Merrion*, 455 U.S. at 141-42, 102 S.Ct. at 903-04, this interest was not extinguished by the right-of-way grant.

B

Tribes retain the authority “to tax the activities or property of non-Indians taking place or situated on Indian lands, in cases where the tribe has a significant interest in the subject matter.” *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 153, 100 S.Ct. at 2081. Here, the Tribes have a significant interest because Burlington’s activities involve use of tribal lands and because Burlington is the recipient of tribal services. *See id.* at 156-57, 100 S.Ct. at 2082-83. Burlington Northern receives the intangible benefits of a civilized society, *see Cotton Petroleum*, 109 S.Ct. at 1714, and the tangible benefits of police and fire protection. To permit taxation of the railroad’s property, the benefits need not “equal

the amount of [Burlington Northern's] tax obligations." *Id.*

Burlington argues the operations of the railroad may not be taxed because these operations are not based upon a consensual relationship with the Tribes and are not controlled by the Tribes but by state and federal authorities. The relevant question is not whether Burlington Northern's activities on the reservation were consensual or subject to control by the Tribes⁷ but whether Burlington Northern receives benefits from the Tribes for which it may be taxed. The answer to that question is yes.

C

If Congress has divested the tribes of authority to tax, it matters not whether the activity sought to be taxed occurs on trust lands or receives benefits from involvement with the Tribe. However, as the Supreme Court said in *Merrion*, 455 U.S. at 149, 102 S.Ct. at 908, "we reiterate here our admonition in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978): 'a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.'"⁸

Burlington Northern contends when Congress adopted the Acts of 1887 and 1888 Congress did not intend the Tribes to have the power to tax railroads because the

⁷ If a consensual relationship was necessary, the Tribes consented to railroad rights of way by joining in Article VIII of the agreement ratified by the Act of 1888 and Burlington Northern chose to run rail lines through the reservations by voluntarily applying for rights of way.

⁸ In 1982 the Supreme Court wrote "[F]ederal law to date has not worked a divestiture of Indian taxing power." *Merrion*, 455 U.S. at 149, 102 S.Ct. at 908 (quoting *Colville Indian Reservation*, 447 U.S. at 152, 100 S.Ct. at 2080). So far as we have been informed, that statement remains true today.

Tribes were "viewed as being outside the white man's culture," Appellant's Opening Brief at 22, and "unprepared to function independently in 19th Century American life." *Id.* at 25; *see also* Reply Brief at 22-24. As the Supreme Court noted in *Merrion*, however, the Senate Judiciary Committee in a report issued in 1879 stated:

"We have considered [Indian tribes] as invested with the right of self-government and jurisdiction over the persons and property within the limits of the territory they occupy, except so far as that jurisdiction has been restrained and abridged by treaty or act of Congress. Subject to the supervisory control of the Federal Government,¹⁹¹ they may enact the requisite legislation to maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life; and *they undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of these vitally important objects*—a right not in any sense derived from the Government of the United States."

Merrion, 455 U.S. at 140, 102 S.Ct. at 903 (quoting S.Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879) (emphasis added by the Court)).

Burlington Northern also contends Congress implicitly divested the Tribes of authority to tax Northern Pacific's property by passage of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"). Indian tribes are not mentioned in the 4-R Act's comprehensive regulatory scheme or the 15-year legislative history of that Act. *See Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857, 95 L.Ed.2d 404 (1987). Burlington Northern treats this

¹⁹¹ The Secretary of the Interior, through the Bureau of Indian Affairs, exercised the requisite supervisory control by approving the taxes at issue in this case.

silence as a "clear indication" that Congress intended to divest the Tribes of their authority to tax railroads. We conclude otherwise.

Congress intended the 4-R Act to end discriminatory taxation by the states, and, not surprisingly, section 11503(b) addresses only state taxation. The silence as to Indian tribes does not "clearly" indicate Congress intended to restrict tribal taxation; more likely it indicates Congress did not consider the subject. *See Merrion*, 455 U.S. at 148 n. 14, 150-52, 102 S.Ct. at 907 n. 14, 908-09.

Burlington Northern's argument that the "complex regulatory scheme" found in the 4-R Act and other federal enactments preempts the Tribes' power to regulate railroads is irrelevant. The Tribes have not attempted to regulate Burlington Northern; they have merely imposed a tax "to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137, 102 S.Ct. at 901.

IV

Burlington Northern contends that if the Tribes have the power to tax, the Tribal taxes imposed here violate the 4-R Act and the Commerce Clause.

A

Section 11503(b) of the 4-R Act prohibits "a State, subdivision of a State, or authority acting for a State or subdivision of a State" from imposing any "tax that discriminates against a rail carrier." 49 U.S.C. § 11503 (b) (4). By its plain language, section 11503(b) applies only to the states and subdivisions thereof. This plain language controls "in the absence of a clearly expressed legislative intent to the contrary." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. at 461, 107 S.Ct. at 1860 (internal quotations omitted).

Throughout extensive Congressional consideration of the 4-R Act only taxation by the states and their sub-

divisions was at issue. Burlington Northern does not contradict this assertion but rather argues the intent of Congress cannot be achieved unless the 4-R Act limits the taxing power of Indian tribes as well as of the states. But once again, we may not impute a meaning to a statute not clearly there when to do so would abrogate Indian rights. See *County of Oneida*, 470 U.S. at 247-48, 105 S.Ct. at 1258-59; see also F. Cohen, *Handbook of Federal Indian Law* 283 (1982 ed.) "congressional intent to override particular Indian rights [must] be clear").¹⁰ We conclude the 4-R Act does not apply to the Tribes.

B

We also reject Burlington Northern's challenge to tribal taxation under the Interstate Commerce Clause. In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190-93, 109 S.Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989), the Supreme Court held the Interstate Commerce Clause does not apply to Indian tribes:

"The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." In fact, the language of the Clause no more admits of treating Indian tribes as States than of treating foreign nations as States.

Id. (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18, 8 L.Ed. (1831)). The Court went on to say

¹⁰ *Phillips Petroleum Co. v. United States Environmental Protection Agency*, 803 F.2d 545 (10th Cir.1986), cited by appellants, is distinguishable. In that case, the court implied coverage of Indian reservations by the Safe Drinking Water Act. The statutory language contained ambiguous references to Indians, the legislative history clearly showed congressional intent to include Indian reservations, and the Tribes supported an interpretation of the statute equating Indian reservations to states. *Id.* at 555-56. The court could also infer congressional intent from Congress' 1986 amendment of the statute to specifically include Indian reservations. *Id.* at 548.

[m]ost notably, as our discussion of Cotton's "multiple taxation" argument demonstrates, the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdictions to trade "with" Indian tribes. *Id.* 109 S.Ct. at 1716.

Nor is the Indian Commerce Clause applicable. The central function of that clause "is to provide Congress with plenary power to legislate in the field of Indian affairs," not to maintain free trade among the States. *Id.*

The Tribes and their legislative and executive bodies are DISMISSED on sovereign immunity grounds. The District Court's decision is AFFIRMED as to the remaining defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MONTANA
GREAT FALLS DIVISION

Nos. CV-87-055-GF, CV-87-120-GF

BURLINGTON NORTHERN RAILROAD,
Plaintiff,
v.

FORT PECK TRIBAL EXECUTIVE BOARD, FORT PECK TRIBAL
TAX COMMISSION, ASSINIBOINE and SIOUX TRIBES of the
FORT PECK INDIAN RESERVATION: KENNETH E. RYAN,
TRIBAL CHAIRMAN; and PAULA BRIEN, TRIBAL SECRE-
TARY/ACCOUNTANT,

Defendants.

BURLINGTON NORTHERN RAILROAD,
Plaintiff,

v.

BLACKFEET TRIBE OF THE BLACKFEET INDIAN NATION;
BLACKFEET TRIBAL BUSINESS COUNCIL; BLACKFEET TAX
ADMINISTRATION DIVISION; EARL OLD PERSON, CHAIR-
MAN; ARCKIE ST. GODDARD, VICE CHAIRMAN; MARVIN
WEATHERWAX, SECRETARY; and ELOISE C. COBELL,
TREASURER,

Defendants.

Nov. 23, 1988

Michael E. Webster, Bruce R. Toole, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Mont., for plaintiff.

Harry S. Sachse, Marvin J. Sonosky, Reid Peyton Chambers, William R. Perry, Sonosky, Chambers & Sachse, Washington, D.C., Ray F. Koby, Swanberg, Koby & Swanberg, Great Falls, Mont., for Fort Peck Tribal Executive Bd., et al.

Jeanne S. Whiteing, Boulder, Colo., Phillip Roy, Donald Kittson, Browning, Mont., for Blackfeet Tribe of Blackfeet Indian Nation, et al.

MEMORANDUM OPINION

HATFIELD, District Judge.

A. THE ASSINIBOINE AND SIOUX TRIBES

The plaintiff, Burlington Northern Railroad, challenges the authority of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana, to impose a tax upon the right-of-way occupied by the Railroad across the Fort Peck Indian Reservation. On May 15, 1987, this court granted the Railroad's request for preliminary injunctive relief, thereby enjoining the Tribes from levying the disputed tax upon the Railroad's right-of-way. The matter is presently before the court on cross-motions for summary judgment for a determination of whether the Tribes should be permanently enjoined from attempting to levy a tax upon the Railroad's right-of-way.

I.

On January 27, 1987, the Tribal Executive Board, as governing body of the Assiniboine and Sioux Tribes, enacted an ordinance implementing a tax known as a "utility property tax". The ordinance was designed to tax the property interests of public and private utilities using tribal trust lands on the Fort Peck Indian Reservation. In general, the tax rate is 3% of the value of the inter-

est held. The ordinance was approved by the Area Director of the Bureau of Indian Affairs on January 28, 1987. The first tax assessments under the ordinance were sent to the taxpayers on April 15, 1987, with payment due by May 15, 1987. Before any taxes were collected, the Railroad brought this action seeking to invalidate the tax as applied to that entity.

The Railroad takes the position that because the right-of-way upon which it operates was established pursuant to an act of Congress, the Tribes have been divested of their sovereign authority to impose a tax with respect to that right-of-way. In the alternative, the Railroad seeks a declaration that the ordinance is null and void, as violative of the Commerce Clause of the United States Constitution and section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (49 U.S.C. § 11503). The Tribes, on the other hand, view the imposition of the tax as a legitimate exercise of their sovereign authority.

II.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982), the United States Supreme Court recognized the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.*, at 137, 102 S.Ct. at 901. Referring to its earlier decision in *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the Court reiterated that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." 455 U.S. at 137, 102 S.Ct. at 901. The power of an Indian tribe to tax derives from the tribe's general authority, as sov-

ereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. 455 U.S. at 137, 102 S.Ct. at 901. Consequently, a tribe's interest in levying taxes on nonmembers is strongest when the revenues are derived from value generated on the reservation by activities involving the tribe, and when the taxpayer is the recipient of tribal services. 455 U.S. at 138, 102 S.Ct. at 902. Therefore, "a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax." 455 U.S. at 141-142, 102 S.Ct. at 903-904. The Court recognized, as evident, the fact that there exists a "significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." 455 U.S. at 142, 102 S.Ct. at 904.

The rationale expressed by the Court in *Colville*, and expounded upon in *Merrion*, requires a tribal interest in the subject matter to justify a tribal tax. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 433-434, n. 27. Use of trust land by a non-Indian supplies such an interest, but on fee land the interest must be based on other circumstances. *Id.*, citing, *Collins, Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash.L.Rev. 479, 508-21 (1979). In those precedential cases in which the use of tribal property by non-Indians was not involved, the tribal interest sufficient to justify a tribal tax upon non-Indians emanated from the fact that the non-Indians entered the reservation for the purpose of transacting business with Indians. See, *Kerr-McGee Corporation v. Navajo Tribe of Indians*, 471 U.S. 195, 105 S.Ct. 1900, 85 L.Ed.2d 200 (1985); *Washington v. Confederated Colville Tribes*, *supra*; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 (1904); *Buster v. Wright*,

135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599, 27 S.Ct. 777, 51 L.Ed. 334 (1906).

In the matter *sub judice*, the Railroad concedes, as it must, the general power of the various Indian tribes to tax the transactions of non-Indians which occur on trust lands and significantly involve a tribe or its members. The court perceives the Railroad's challenge to the contested tax to be predicated upon its conclusion that the territorial component, essential to the valid exercise of the Tribes' taxing authority, is absent with respect to the subject right-of-way. The position of the Railroad is based upon its conclusion that the right-of-way is not tribal property and that the Tribes' interest in the operation of the railroad upon that right-of-way is insufficient to justify the imposition of a tribal tax.

The Tribes on the other hand, confident the right-of-way is properly considered reservation trust land, submit the tax must be sustained as a legitimate exercise of the Tribes' inherent sovereign authority. The Tribes see no legitimate basis upon which application of the tax to the Railroad's right-of-way can be distinguished from application of the tax to any other non-Indian business holding a possessory interest on reservation land. Tribal consent, the Tribes submit, was essential to the establishment of the right-of-way. The Tribes view the right-of-way as but an easement, with beneficial title to the land over which the right-of-way crosses remaining in the Tribes. The Tribes contend the implementation of the tax is a valid exercise of their sovereign authority to control economic activity within the tribes' jurisdiction. In the opinion of the Tribes, their possessory interest tax is indistinguishable, in essence, from the tribal tax sustained by the Supreme Court in *Merrion*. The initial question to be addressed is whether Congress, in establishing the subject right-of-way, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way.

III.

Analysis must obviously begin with a review of the history pertinent to the establishment of the subject right-of-way. Pursuant to the Act of April 15, 1874, 18 Stat. 28, Congress set apart a vast area of land in that area of the western United States, which is now the State of Montana, as the "Blackfeet" reservation for the "use and occupation" of numerous Indian tribes, including the Assiniboine and Sioux Tribes. By the Act of May 1, 1888, 25 Stat. 113, Congress established the present diminished boundaries of three Indian reservations, *i.e.*, *Fort Peck*, *Fort Belknap* and *Blackfeet*. The Act of May 1, 1888, represented the congressional ratification of, *inter alia*, a December 28 and 31, 1886, agreement between the United States and the Assiniboine and Sioux Tribes, whereby the Tribes ceded and relinquished all their right, title, and interest in and to all lands embraced within the 1874 reservation, not specifically set apart and reserved as separate reservations for these Tribes. Between the time the 1886 Agreement was reached amongst the Assiniboine and Sioux Tribes and the United States, and the passage of the Act of May 1, 1888, ratifying that agreement, Congress passed the Act of February 15, 1887, 24 Stat. 402, which granted the subject right-of-way to the *Burlington Northern's* predecessor-in-interest. The right-of-way passed through lands of the 1874 reservation which were eventually included within the boundaries of the *Fort Peck Indian Reservation* as established by the Act of May 1, 1888.¹

¹ The Act of May 1, 1888, specifically addressed the grant of rights-of-way through the newly formed reservation in Article VIII which provided:

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, . . . through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right-of-way shall be, and is hereby granted for such purposes, under such rules, regulations, limitations, and re-

Review of the history pertinent to the establishment of the Fort Peck Indian Reservation reveals that the Tribes' property rights in the reservation were established by specific acts of Congress. The Tribes, therefore, held full beneficial fee interest in the land comprising the right-of-way, as they did to all land comprising the reservation created by the Act of April 15, 1874. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 477-485 (1982 ed.), and cases cited therein. As the Tribes readily recognize, however, the United States retains fee title to the land comprising all Indian reservations. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

Consistent with the "plenary power of legislation" in regard to Indian affairs, Congress may extinguish tribal interest in real property subject to the stricture of the fifth amendment to the United States Constitution requiring just compensation for deprivation of property interests. See, *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). As emphasized by Chief Justice Marshall in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 586, 5 L.Ed. 681, (1823) "the exclusive right of the United States to "extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 U.S. 517, 525, 24 L.Ed. 440 (1877). This precise point was reiterated by the Supreme Court in *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941), wherein the court stated:

strictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raised political, not justiciable, issues. *Buttz v. Northern Pacific Railroad*, 119 U.S. [55] at 66. [7 S.Ct. 100, 104, 30 L.Ed. 330].

Consequently, Congress has complete discretion to determine when to extinguish Indian title to reservation land thereby determining when the rights of a grantee to that land become possessory rights. See *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. at 347, 62 S.Ct. at 252. In ascertaining whether Congress elected to extinguish Indian title, the court is mindful of the Supreme Court's caution in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*:

But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675 [32 S.Ct. 565, 569, 56 L.Ed. 941] the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." (citations omitted)

Id. at 354, 62 S.Ct. at 255.

More recently, in *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the Court reiterated that an intent to abrogate Indian rights would not be "lightly imputed to conceive that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying a Tribe's property rights. 391 U.S. at 413, 88 S.Ct. at 1711.

In determining whether Congress, in granting the subject right-of-way, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way, the court must examine the text of, and the legislative history attendant, the operative legislation, and consider the time and circumstances surrounding enactment of that legislation. *See, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660 (1977); *see also, Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973); *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984).

IV.

The Burlington Northern construes the Act of February 15, 1887, as a grant *in praesenti*, which effectively extinguished the Tribes' beneficial interest in the land comprising the right-of-way. The Tribes, however, take the position that the right-of-way granted the Burlington Northern Railroad Company's predecessor-in-interest was simply an easement. Congress did not, the Tribes argue, intend to extinguish the beneficial title held by the Tribes in the land comprising the right-of-way. Rather, the Tribes submit, the right-of-way was negotiated by the Tribes via the 1886 Agreement and simply approved by the federal government through the enactment of the Act of May 1, 1888.

The Act of February 15, 1887, provided, in specific terms: "the right-of-way is hereby granted for the extension of its railroad through the lands set apart [by the 1874 Act] for the use of the [Tribes]." Act of February-15, 1887, § 1. The grant of the right-of-way was conditioned upon, *inter alia*, the Tribes being compensated in an amount to be determined by the Secretary of the Interior. In that regard, Section 4 of the Act of February 15, 1887, provided in pertinent part:

No right of any kind shall vest in said railroad company in or to any part of the right of way herein

provided for until plats thereof, made upon actual survey for the definite location of such railroad . . . shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid fixed by the Secretary [for the Indians] has been fixed and paid. . . .

Because the United States retained fee title to the land comprising the subject right-of-way, specific congressional authorization was necessary to effectuate the grant of the right-of-way to the Burlington Northern's predecessor in interest.² The Act of February 15, 1887, obviously accomplished that grant.³

The fact the Tribes held beneficial title to the land comprising the right-of-way would not, of course, have prevented the grant of Congress from operating to pass the right-of-way to the grantee. *See, Missouri, Kansas & Texas Railway Company v. Roberts*, 152 U.S. 114, 116-

² The Act of March 2, 1899, granted the Secretary of Interior the general authorization to grant rights-of-way for railroads through Indian reservations. Act of March 2, 1899, Chapter 374, 30 Stat. 990 (25 U.S.C. § 312). Prior to the 1899 Act railroad rights-of-way through reservations were granted piecemeal, either by treaty provision, or by special statute providing for compensation to the Secretary of the Interior for the benefit of the Indians. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 542, n. 135 (1982 ed.).

³ The creation of the reservation in 1874 made the March 3, 1875, General Railroad Right-of-Way Act (18 Stat. 482) inapplicable. In *Great Northern Railroad Company v. United States*, 315 U.S. 262, 273-279, 62 S.Ct. 529, 533-536, 86 L.Ed. 836 (1942), the Supreme Court held, with respect to those portions of this same rail line for which the right-of-way was acquired by the railroad's predecessor-in-interest under the general right-of-way statute, Act of March 3, 1875, *see* 152, 18 Stat. 482, the Act granted "a present beneficial easement," but did not serve to convey fee title. The Tribes submit that *a fortiori*, a right-of-way grant across Indian trust lands carries no greater estate than the one over public lands. The court is unpersuaded that this simple deduction resolves the issue presented here for determination.

118, 14 S.Ct. 496, 497-498, 38 L.Ed. 377 (1894); *Buttz v. Northern Pacific Railroad*, 119 U.S. 55, 66, 7 S.Ct. 100, 104, 30 L.Ed. 330 (1886). In *Missouri, Kansas & Texas Railway Company v. Roberts*, 152 U.S. 114, 14 S.Ct. 496, 38 L.Ed. 377, the Court explained the authority of Congress in this regard:

The United States had the right to authorize the construction of the road of the Missouri, Kansas and Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of the two hundred feet as a right of way to the company. Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the government; and when transferred, without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject to their right of occupancy; and the manner, time and conditions on which that right should be extinguished were matters for the determination of the government, and not for legal contestation in the courts between private parties. This doctrine is applicable generally to the rights of Indians to lands occupied by them under similar conditions. It was asserted in *Buttz v. The Northern Pacific Railroad Company*, 119 U.S. 55 [7 S.Ct. 100, 30 L.Ed. 330] and has never, so far as we are aware, been seriously controverted. In that case, the lands were within what is known as Indian country, where the right of the Indians to the occupancy of their lands was recognized; and in grants by the government of portions thereof for works of internal improvement, there usually was a stipulation for its extinguishment as rapidly as might be consistent with public policy and the welfare of the Indians. Such a stipulation was given when the grant under consideration in the case was made, showing that the government intended the

grant to take effect notwithstanding any existing right of occupancy by the Indians, and it was deemed a sufficient expression of its intention to that effect. No such stipulation was made when the grant of the right of way through the Osage reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration.

152 U.S. at 116-118, 14 S.Ct. at 497-498. Cognizant of this fact, the Tribes intimate that the passage of the Act of February 15, 1887, transferred the right-of-way subject to the Tribes' beneficial title. Therefore, the Tribes submit, the Burlington Northern is mistaken in its assertion that Congress intended the grant to be absolute in its terms, unencumbered by the Tribes' right of occupancy.

The Burlington Northern counters the Tribes' proposition with the suggestion that tribal assent was not a prerequisite to extinguishment of the Tribes' beneficial title. Emphasizing the fact the Act of February 15, 1887, predicated the Act of May 1, 1888, by more than 14 months, the Burlington Northern asks the court to infer that Congress did not act pursuant to the Agreement of 1886 in granting the right-of-way.

The court is mindful of the fact that treaty making with Indian tribes effectively ended with passage of the Appropriations Act of March 3, 1871, Chapter 120, § 1, 16 Stat. 544, 566 (codified and carried forward at 25 U.S.C. § 71). *See*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 515 (1982 ed.) (citing examples). Nonetheless, while formal treaty making was abandoned, the federal government continued to make agreements with Indian tribes for the conveyancing of tribal lands, many similar to treaties, that were approved by both houses of Congress. *Id.* at 107. Regardless of the meth-

odology employed by Congress in effectuating a grant or cession of an interest in tribal land, however, the authority of Congress to extinguish an Indian tribe's beneficial title to reservation land remains unquestioned. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119-123, 80 S.Ct. 543, 555-557, 4 L.Ed.2d 584 (1960); *see also, Henkel v. United States*, 237 U.S. 43, 47-50, 35 S.Ct. 536, 538-539, 59 L.Ed. 831 (1915). From the time of the enactment of the Appropriations Act of March 3, 1871, the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress. *Re Heff*, 197 U.S. 488, 498, 25 S.Ct. 506, 508, 49 L.Ed. 848 (1905) (*overruled on other grounds, United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916)). Where Congress clearly expresses its intent to extinguish an Indian tribe's beneficial title to reservation land, that legislative decision is not subject to legal contestation in the courts. *Buttz v. Northern Pacific Railroad Company*, 119 U.S. at 66, 7 S.Ct. at 104.

The legislative history attendant passage of the Act of February 15, 1987, evinces the understanding of Congress that the United States held fee title to the lands comprising the Indian reservation created by the Act of April 15, 1874, as it does to the land comprising all Indian reservations. *See, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *Buttz v. Northern Pacific Railroad*, 119 U.S. at 66, 7 S.Ct. at 104.⁴ The entire history surrounding the grant

⁴ The comments offered by Senator Teller of Colorado during the Senate debates leading to the passage of the Act of February 15, 1887, poignantly address this precise point. With specific reference to the compensation provisions incorporated into the Act, Senator Teller stated:

"I have not any objection to the United States making any donations to the Indians whenever the Government of the United States sees fit. The bill shows that this is not Indian land in any sense of the term. The President of the United States reserves this land. He can tomorrow declare it to be public land again if he sees fit.

of the right-of-way further reflects that Congress was well aware of the beneficial title which the Tribes held to the lands comprising the reservation created by the 1874 Act. Specifically, in 1886 Congress established a Northwest Indian Commission to negotiate an agreement of cession with the Indians holding title to the land comprising the 1874 Act reservation. Act of May 15, 1886, c. 333, 24 Stat. 29, 44. The Commissioners appointed by the Secretary of the Interior pursuant to the Act of May

He reserves it for use of the Indians. I have not any doubt about his authority to have allowed this railroad to be built across the land without any act of Congress; but they have seen fit to come to Congress and we provide that the Secretary of the Interior shall fix a price the railroad is to pay, not to the Government, whose land it is, but to the Indians, who have no title whatever in the land. . . . Here we provide payment to Indians who are occupying a piece of ground under an executive order. The executive order gives them no rights whatever. It simply reserves the land from occupation by white men. Now we say the Indians shall be paid for this land which they do not own. It seems to me that this provision of the bill ought to be stricken out. . . ."

18 Cong.Rec., 1436-1437 (Feb. 7, 1887).

Senator Teller was referring to those portions of the affected reservation which were created by executive order. While his conclusion that the Tribes held no title whatsoever in the land comprising the reservation established by executive order would appear to be incorrect, *see, Sioux Tribe v. United States*, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), his comments are indicative of the fact that Congress was aware the United States held fee title to the land comprising the subject right-of-way. The report accompanying that bill, which was introduced into the House of Representatives and ultimately passed as the Act of February 15, 1887, reflects the understanding that the Indians held beneficial title to the land comprising the reservation.

Such portions [of those reservations through which the right-of-way is granted] as are covered by statute and executive orders are merely set apart for the occupancy of the Indians. The fee remains in the Government. No right to the soil is conferred. The power that set them aside can modify them. But notwithstanding this, the Bill out of abundant caution carefully provides for all of the rights of the Indians and their proper compensation.

H.R. Rep. No. 3487, 49th Cong., 2d Sess. 1436-1437 (1887).

15, 1886, negotiated an agreement with the Tribes which provided that the Assiniboine and Sioux Tribes and other Tribes having an interest in the reservation created by the Act of 1874 did "cede and relinquish all their right, title and interest in and to all the lands embraced within [the 1874 reservation] . . . not herein specifically set apart and reserved as separate reservations for them." The 1886 Agreement further provided in Article VIII that right-of-way through the reservation was granted by the various tribes for, *inter alia*, railroads, subject to the prescriptions delineated by the Secretary of the Interior, including compensation for the affected tribe. *See*, n. 1, *supra*. As noted, the 1886 Agreement was ultimately ratified by Congress in the Act of May 1, 1888, 25 Stat. 113. The Act expressly reiterated that the reservation established by the Act of April 15, 1874, was set apart for the "use and occupancy" of various Indian tribes, including the Assiniboine and Sioux tribes.

The entire thrust of the Tribes' argument is that tribal assent was a condition precedent to the grant of the right-of-way, since tribal assent was necessary to the extinguishment of the Tribes' beneficial title to the land comprising the right-of-way. Consistent with this premise, the Tribes expressly state that the Act of February 15, 1887, merely implemented the 1886 Agreement and must be viewed as nothing other than congressional consent to the Tribes' transfer of the right-of-way to the Burlington Northern's predecessor in interest. The Tribes support their position with inferences drawn from the fact that the congressional decision to establish the right-of-way through the entire Blackfeet Reservation created by the Act of April 15, 1874, occurred in temporal proximity with that legislation designed to diminish the Blackfeet Reservation created by the Act of April 15, 1874; dividing that reservation into three smaller separate reservations. The Tribes cite no authority in support of their assertion that tribal assent was necessary to the

establishment of the right-of-way through reservation lands to which any Indian tribe held beneficial interest.

The Act of February 15, 1887, granted right-of-way through the Blackfeet Indian Reservation as comprised by the Act of April 15, 1874, and the Fort Berthold Reservation in the northwestern Dakota Territory. Act of February 15, 1887, 24 Stat. 402, § 1. Consistent with its plenary authority to do so, Congress could have included the right to possession within its grant. Moreover, the fact Congress, in its ratification of the 1886 Agreement establishing the diminished boundaries of the Fort Peck Indian Reservation, approved that provision of the Agreement recognizing the reserved right of the federal government to use the lands of that reservation for certain public improvements, would not, in itself, serve to derogate the validity of such a grant. The determinative inquiry is whether Congress, in its enactment of the Act of February 15, 1887, intended to extinguish the Tribes' beneficial title to the land comprising the right-of-way.

It is generally recognized that in the absence of an expressed intent of Congress to the contrary, railroad land grants have not affected tribal possessory rights. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 518 (1982 ed.), e.g., *Northern Pacific Railroad Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913); *Buttz v. Northern Pacific Railroad Co.*, *supra*; *Leavenworth, L.G. & R.R. v. United States*, 92 U.S. 733, 23 L.Ed. 634 (1875). Focusing upon the legislative history attendant passage of the Act of February 15, 1887, one is inexorably compelled to conclude that Congress did not express a clear intent to extinguish the beneficial title of all Indian tribes holding such an interest to the land comprising the right-of-way. Review of the statements made by individual Senators during the debate leading to passage of the bill, specifically the comments of Senator Teller, as set forth in n. 4, *supra*, evince a desire to extinguish the Tribes' beneficial title. The colloquy

spawned by Senator Teller's comments, however, fail to unequivocally establish that Senator Teller's view was shared in total by his Senate colleagues. A review of that colloquy is instructive:

MR. DOLPH. I think this is a matter of more importance than seems to be considered by a majority of the Senate. In the first place, the Government has granted by general act the right of way over the public lands to every railroad company that chooses to comply with the provisions of the act of March 3, 1875. I judge from the letter of the Secretary of the Interior, and I so understand it, that the Government had already extinguished the Indian title to these lands before this reservation was set aside by executive order.

MR. TELLER. Certainly it had.

MR. DOLPH. Then the President comes in and sets aside a portion of the public domain for the use of the Indians as a reservation. If it had not been for that order, there is already existing legislation which would grant to the railroad company, by compliance with its conditions, a right of way over those lands.

Now, because of the executive order, and because the President does not choose to modify the executive order in-so-far as to allow the company to locate its line over this land and to file its maps and thereby secure the right of way, the company comes to Congress for leave to deal with the Indians in regard to the reservation. As I understand, there is a provision in the bill to the effect that the company shall pay the Indians for the land—which does not belong to them, but belongs to the Government—as well as to pay for the injury done to the improvements made by the Indians.

I think it is a wrong principle, and, as suggested by the Senator from Missouri [Mr. Cockrell], it might commit us to the idea, at least as a precedent,

that the Indians had a right to the soil, or the power of the President to donate land to Indians at any time. I understand the President could rescind his order at any time, and throw any one of the reservations which have been created by executive order open to settlement without any act of Congress whatever.

MR. DAWES. There is no doubt about the President's authority to vacate the order by which he established the reservation, and there is no doubt in my mind that he could permit the railroad company to go over the land by excepting from his order so much of the land as would be occupied by the railroad. But the President and those administering Indian affairs decline to do that; and they, with the railroad company and the Indians, have agreed that for the use of this right of way, while the executive order exists, the railroad company shall pay the Indians what the Secretary of the Interior says they ought to pay for the use of the land while the executive order exists. The Senate can decline to grant this right, and the Interior Department will decline to let the railroad go through, and I shall be entirely satisfied.

MR. TELLER. Has the agreement already been made between the company and the Indians?

MR. DAWES. But, it seems to me, all at once somebody is straining at a gnat and swallowing a camel. I do not know who it is, but the idea that when the railroad company is perfectly willing to pay the Indians for the use of the land just what the Secretary of the Interior agrees, and they have all three gone into the agreement, and the money is ready, then because perchance in accordance with strict law the Secretary had the power to do it without this proposed act, the Senate may decline to pass the bill if they choose.

See, 18 Cong. Rec., 1436-1437 (Feb. 7, 1887).

The statements of individual legislators are appropriately considered with other pertinent indices of legislative intent in determining the construction to be afforded a particular statute. *See, Chrysler v. Brown*, 441 U.S. 281, 361, 99 S.Ct. 1705, 1751, 60 L.Ed.2d 208 (1979). The statements of individual legislators, however, should not be given controlling effect unless they are consistent with statutory language and other legislative history which justifies reliance upon them as evidence of Congress' intent. *Grove City College v. Bell*, 465 U.S. 555, 567, 104 S.Ct. 1211, 1218, 79 L.Ed.2d 516 (1984).

In searching for the intent of Congress in the passage of the Act of May 1, 1888, the court is not limited, however, to the "lifeless words of the statute," but recognizing that the Act in question was the product of the period, the court may "with propriety refer to the history of the times when the Act was passed." *Great Northern Railway Company v. United States*, 315 U.S. 262, 273, 62 S.Ct. 529, 533, 86 L.Ed. 836 (1942) (citations omitted). In the *Great Northern* case, the Court was called upon to ascertain the nature of the rights conferred upon the Burlington Northern's predecessor in interest with respect to a right-of-way granted under authority of the Act of March 3, 1875.⁵ In resolving the question presented, the Supreme Court relied extensively upon a sharp shifting congressional policy occurring in 1871 with respect to the granting of railroad rights-of-way. *See, Great Northern Railway Company v. United States*, 315 U.S. 262, 273-276, 62 S.Ct. 529, 533-535, 86 L.Ed.2d 836 (1941). Recognizing that legislation establishing railroad right-of-way granted, in general, a more limited interest, the Court in *Great Northern* concluded that it was im-

⁵ The right-of-way of concern in the *Great Northern* case is one associated with the same rail line which utilizes the right-of-way at issue in the case at bar. The right-of-way at issue in the *Great Northern* case crossed public lands contiguous to the Blackfeet Indian Reservation as defined by the Act of May 1, 1888.

probable that Congress intended by the Act of March 3, 1875, to grant more than a right of passage. 315 U.S. at 274-275, 62 S.Ct. at 534-535.

Having assiduously reviewed the text of, and legislative history attendant, the Act of February 15, 1887, the court is compelled to conclude that the expression of Congress' intent contained therein with respect to the extinguishment of the Tribes' beneficial title to the land comprising the right-of-way is, at best, ambiguous. Consistent with compelling precedent, this doubtful expression must be resolved in favor of the Tribes. *See, Menominee Tribe v. United States*, 391 U.S. at 413, 88 S.Ct. at 1711; *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. at 354, 62 S.Ct. at 255.

Accordingly, the court finds the Tribes retain beneficial title to the land comprising the Railroad right-of-way across the Fort Peck Indian Reservation. Hence, the territorial component essential to the valid exercise of the Tribes' taxing authority is satisfied with respect to the disputed tax.

V.

Cognizant of the plenary authority of Congress to limit tribal sovereignty, and particularly a tribe's authority to tax non-members, *see, Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 141, 102 S.Ct. at 903, the court now addresses the Railroad's argument that Congress has implicitly abrogated the Tribes' authority to impose the utility tax. The Railroad generally asserts that the comprehensive regulatory scheme implemented by Congress to govern the operation of railroads in interstate commerce, evince a congressional intent to preempt taxation of railroads by Indian tribes. Tribal taxation of the Railroad's right-of-way interest, the Railroad submits, would be inconsistent with the superior interest of the United States in having a uniform system of railroad regulation. The Railroad places specific reliance upon section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210,

90 Stat. 31 (49 U.S.C. § 11503), which the Railroad contends, implicitly divests the Tribes of their inherent sovereign authority to impose a tax upon the Railroad.

The arguments advanced by the Railroad are identical to those advanced by the petitioner in *Merrion* challenging the severance tax at issue in that case. Accordingly, the mode of analysis utilized by the Supreme Court in *Merrion* is appropriately followed by this court in reviewing the Railroad's argument that Congress divested the Tribes of their authority to impose the utility tax at issue. The court appropriately undertakes its review cognizant of the admonition espoused in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60, 98 S.Ct. 1670, 1678, 56 L.Ed.2d 106 (1978) :

The proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent. The purpose of the Railroad Revitalization and Regulatory Reform Act was 'to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States.'

Section 101(a).

Among the means chosen by Congress to fulfill these objectives, particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property. *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987). Congress' solution to the problem of discriminatory state taxation of railroads was embodied in section 306 of the Act, currently codified at 49 U.S.C. § 11503. *Id.*⁶ The

⁶ Title 49 U.S.C. § 11503(b) provides in relevant part:

The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not

Act does not refer to Indian tribes and the language of the Act can hardly be construed as providing a clear indication that Congress intended to deprive the various Indian tribes of their sovereign power to tax. Accordingly, the court is constrained to find that the Federal Government has not divested the Tribes of their inherent authority to tax the Railroads' right-of-way. *See, Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 152, 102 S.Ct. at 909.

Contrary to the assertion of the Railroad, the situation presented is akin to that addressed by the Supreme Court in *Merrion*. Like the petitioner in *Merrion* the Railroad is unable to explain why state taxation of the same type of activity, of which the Railroad complains, escapes the asserted conflict with federal policy. 455 U.S. at 151, 102 S.Ct. at 908, *citing, Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). Moreover, the court is persuaded by the Tribes' argument that the tax fosters rather than inhibits, an important national policy, *i.e.*, promotion of Indian self-determination and economic development, *see, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, 103 S.Ct. 2378, 2387, 76 L.Ed.2d 611 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 and n. 10, 100 S.Ct. 2578, 2584 and n. 10, 65 L.Ed.2d 665 (1980); by providing a means of enabling tribal government necessary to the provision of essential government services.

do any of them: (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property. (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection. . . .

See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137, 102 S.Ct. at 901.

VI.

Finally, the court reviews the Railroad's argument that the utility tax, as applied to the Railroad, violates the "negative implications" of the commerce clause of the United States Constitution.⁷

It is a well-established principle that a state violates the "negative implications" of the interstate commerce clause by unilaterally enacting legislation which unduly burdens or discriminates against interstate commerce. Review by federal courts is obviously appropriate where such unilateral state action is challenged, since such review insures that states do not disrupt or burden interstate commerce when the power vested in Congress by the interstate commerce clause remains unexercised. See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 154, 102 S.Ct. at 910. Review in those instances is essential to safeguard Congress' latent power from encroachment by the several states. Federal courts may legitimately engage in this review, however, only when Congress has not acted or purported to act. *Id.*, citing, *Prudential Insurance Company v. Benjamin*, 328 U.S. 408, 421-427, 66 S.Ct. 1142, 1150-1154, 90 L.Ed. 1342 (1946). As stated by the Court in *Merrion*:

Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce,

⁷ Cognizant of the conceptual difficulty acknowledged by the Supreme Court with respect to the review of tribal action under the interstate commerce clause, and the Court's refusal to review tribal regulation of commerce under the Indian commerce clause, this court, as did the Court in *Merrion*, assumes that tribal action is subject to the limitations of the interstate commerce clause. 455 U.S. at 153-54, 102 S.Ct. at 910-11.

and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action. See *Prudential Insurance Company v. Benjamin, supra*, [328 U.S.] at 431 [66 S.Ct. at 1155]. Courts are final arbiters under the Commerce Clause only when Congress has not acted. See, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. [134] at 454 [99 S.Ct. 1813, 1824, 60 L.Ed. 336].

455 U.S. at 154-155, 102 S.Ct. at 910-911.

Where Congress acts pursuant to the authority vested in that body by the interstate commerce clause to approve a tax by an Indian tribe, it is not the function nor the prerogative of the federal courts to question the wisdom of that decision. See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 156, 102 S.Ct. at 911. As the Court in *Merrion* recognized, where Congress has affirmatively acted by providing a series of federal checkpoints that must be cleared before a tribal tax can take effect and a challenged tax has traveled through those precise channels, judicial review of the validity of the tax under the "negative implications" of the interstate commerce clause is precluded. 455 U.S. at 155-156, 102 S.Ct. at 910-911.

The same checkpoints recognized by the Court in *Merrion* are present in the case at bar. Consistent with the requirements of the Indian Reorganization Act, 25 U.S.C. §§ 476, 477, the Tribes obtained approval from the Secretary before they adopted the constitution announcing their intention to tax nonmembers. Further, before the ordinance imposing the tax challenged by the Railroad could take effect, the Tribes were required again to obtain approval from the Secretary. See, CONSTITUTION AND BYLAWS OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION, Article VIII, section 3. Both the Tribes' constitution and the challenged tax ordinance received the requisite approval from the Secretary of the Interior. Consequently, this court is

without authority to strike down the tax as violative of the "negative implications" of the interstate commerce clause.

B. THE BLACKFEET TRIBE

The Burlington Northern Railroad challenges the authority of the Blackfeet Tribe of Indians to tax the right-of-way occupied by that entity on land crossing the Blackfeet Indian Reservation. The Railroad seeks a declaration that the Blackfeet Tribe of Indians is without authority to impose a tax upon the right-of-way held by the Railroad across lands within the boundaries of the Blackfeet Indian Reservation. On July 20, 1978, the court entered an order preliminarily enjoining the Blackfeet Tribe from levying the disputed tax upon the Railroad's right-of-way. The matter is presently before the court on cross-motions for summary judgment for a final determination of whether the Blackfeet Tribe should be permanently enjoined from attempting to levy the disputed tax.

I.

The Blackfeet Tribe of Indians is a tribe organized under a constitution and by-laws promulgated under authority of the Indian Reorganization Act of 1934 (25 U.S.C. §§ 476 *et seq.*). The Blackfeet Tribal Council, as governing body of the Blackfeet Tribe, is empowered by the Blackfeet Constitution to levy taxes upon nonmembers of the Tribe "trading or residing" within the Blackfeet Reservation. *See, BLACKFEET CONSTITUTION*, art. VI(1) (h). On December 30, 1986, the Blackfeet Tribal Council enacted a possessory interest tax ordinance which authorized taxation of any interest in real property located within the Blackfeet Reservation. The ordinance was approved by an authorized representative of the Secretary of Interior on April 9, 1987. The Blackfeet Tribe has deemed the ordinance applicable to the Railroad's right-of-way across the Blackfeet Reservation, and has

taken steps to levy the tax upon the right-of-way. The Tribe views the imposition of the tax as a legitimate exercise of its sovereign authority.

The Railroad asserts that because the right-of-way it holds over the Blackfeet Reservation was established pursuant to an act of Congress, the Blackfeet Tribe has been divested of its sovereign authority to impose a tax with respect to that right-of-way. In the alternative, the Railroad seeks a declaration that the ordinance is null and void, as violative of the commerce clause of the United States Constitution and section 306 of the Railroad Revitalization and Regulatory Reform Act, Pub.L. 94-210, 90 Stat. 31 (49 U.S.C. § 11503).

The court need not restate the general principles of law determinative of an Indian tribe's right to impose a tax upon a nonmember, or the principles of statutory construction applicable to legislation affecting the rights of Indian tribes. The pertinent principles previously discussed by the court, in the companion case of *B.N. v. Assiniboine and Sioux Tribes of the F.P. Indian Reservation*, CV-87-055-GF (D.Mont.1988), obviously guide analysis of the issue presented here for determination. Therefore, the court turns to determine whether Congress acted to extinguish the Blackfeet Tribe's beneficial interest in the land comprising the right-of-way.

II.

The Blackfeet Reservation, as presently existing, was originally reserved to the Blackfeet Tribe by the Treaty of October 17, 1855, 11 Stat. 657. The original reservation was subsequently reduced in size and modified by various executive orders, congressional acts and agreements. See, e.g., Exec. Order of July 5, 1873; Act of April 15, 1974, 18 Stat. 28. Of these orders and acts, the one of principal importance to the present controversy is the Act of April 15, 1874, by which Congress set apart a vast area of land for the "use and occupation" of numerous Indian tribes

including the Blackfeet Tribe. By the Act of May 1, 1888, 25 Stat. 113, Congress established the present diminished boundaries of three separate reservations for the various northern Montana Indian tribes, one of which was the Blackfeet Reservation. The Blackfeet Reservation continued within its aboriginal territory and within the original reservation boundaries established in 1855 and 1874. The Act of May 1, 1888, represented the congressional ratification of agreements of land cession, executed between the United States and the various northern Montana tribes, including the Blackfeet Tribe.

Article VIII of the Act of May 1, 1888, provided that right-of-way through the reservations was granted by the various tribes for, *inter alia*, railroads; subject to the prescriptions delineated by the Secretary of the Interior, including compensation for the affected tribe.* On September 29, 1890, the Burlington Northern's predecessor in interest, *i.e.*, St. Paul, Minneapolis & Manitoba Railway Company, having begun construction of its railroad through eastern Montana, applied to the Commissioner of Indian Affairs for authority to extend its line of railway through the Blackfeet Indian Reservation. On October 20, 1890, President Benjamin Harrison, pursuant to Article VIII of the Act of May 1, 1888, granted the railroad's application for right-of-way. On October 24, 1890, the Secretary of the Interior prescribed the dimensions of the right-of-way to be the same as the dimensions prescribed for the right-of-way granted by the Act of February 15, 1887, 24 Stat. 402, across portions of the Blackfeet Reservation as established by the Act of April 15, 1874.

The Railroad seeks a declaration that Congress extinguished the Blackfeet Tribe's beneficial interest to that reservation land comprising the right-of-way granted the Burlington Northern's predecessor in interest. The Blackfeet Tribe takes the position that the grant of the right-of-

* See, n. 1, *supra*.

way was, in effect, negotiated and granted by the Blackfeet Tribe. Accordingly, the Blackfeet Tribe asserts that the right-of-way granted to the Burlington Northern Railroad Company's predecessor in interest was simply an easement granted by the Tribe and approved by Congress.

Analysis must begin with recognition of the fact that the Blackfeet Tribe held full beneficial fee interest in the land comprising the right-of-way. See, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 477-485 (1982 ed.), and cases cited therein.⁹ Consequently, the question presented is whether Congress acted to extinguish the Blackfeet

⁹ For purposes of the present analysis, the court considers the Blackfeet Tribe's property rights in the reservation as established by specific Acts of Congress and, therefore, subject to the just compensation requirement of the fifth amendment to the United States Constitution. See, *Shoshone Tribe v. United States*, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360 (1937); *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Without specific discussion, the Blackfeet Tribe alludes to the fact that the Blackfeet Reservation, as presently existing is part of the aboriginal territory of the Blackfeet Tribe. Regardless of whether the title held by the Blackfeet Tribe to the land comprising the right-of-way in question is considered "recognized" title held pursuant to congressional action, or "unrecognized" title based upon aboriginal title, see F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 486-493 (1982 ed.), the Blackfeet Tribe had the right to occupy that land. See, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1823). As with recognized Indian title, the underlying fee simple title of lands to which an Indian tribe holds unrecognized title can be conveyed subject to the Indian right of occupancy. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L.Ed. 162 (1810). Likewise, the exclusive right to extinguish original Indian title rests with Congress, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941), and such title will be deemed to have been extinguished only where there exists a clear and specific indication of congressional intent to abrogate that title. See, *United States ex rel Hualpai Indians v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 354, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941).

Tribe's title to the land comprising the right-of-way granted the Burlington Northern's predecessor in interest through the Blackfeet Reservation.

Whether or not the Blackfeet Tribe's beneficial title to the land was extinguished depends upon the construction to be given the act of Congress granting that right-of-way. *United States v. Soldana*, 246 U.S. 530, 531, 38 S.Ct. 357, 358, 62 L.Ed. 870 (1918). If the Blackfeet Tribe's beneficial title to that land was extinguished by the grant, the right-of-way is not within Indian country. *Id.* at 531, 38 S.Ct. at 358, *citing, Bates v. Clark*, 95 U.S. 204, 24 L.Ed. 471 (1877). The parties concede that the only statute which need be considered in determining whether the Blackfeet Tribe's beneficial interest to the land comprising the right-of-way was extinguished is the Act of May 1, 1888, 25 Stat. 113, which confirmed the establishment of the diminished boundaries of the Blackfeet Indian Reservation.

In construing the Act of May 1, 1888, from which the Railroad derives the interest it holds in the right of way across the Blackfeet Reservation, the court is not unmindful of the fact that in the absence of an expressed intent of Congress to the contrary, railroad land grants have been construed as not having affected tribal possessory rights. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 518 (1982 ed.), and cases cited as examples. Moreover, the court recognizes that the Act of May 1, 1888, was intended fully to protect Indian interests. Accordingly, it must be liberally construed in favor of the Indians, *see, Bryan v. Ataska County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976); *accord, Southern Pacific Transportation Company v. Watt*, 700 F.2d 550, 552 (9th Cir.1983), with any doubtful expressions of congressional intent being resolved in favor of the Blackfeet Tribe. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) (*quoting, Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930)).

This court is further guided by the Supreme Court's decision in *United States v. Soldana, supra*, wherein the United States Supreme Court was called upon to determine whether a railroad right-of-way granted through the Crow Indian Reservation, pursuant to Article VIII of the same Act of May 1, 1888, was properly considered Indian country for purposes of the enforcement of criminal statutes. The Court stated:

Whether these Acts should be held to have granted a mere easement or a limited fee or some other limited interest in the land, (citations omitted); it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way. To have accepted the strip from the reservation would have divided it into two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure.

246 U.S. at 532-33, 38 S.Ct. at 358-359.

In reaching its determination, the Court in *Soldana* also considered the Act of February 12, 1889, 25 Stat. 660, which specifically granted the right-of-way through the Crow Indian Reservation. That Act provided, at section 5, that the grant of the right-of-way was upon the express condition that the grantees and successors "will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy that is hereinbefore provided: *provided*, that any violation of the condition mentioned in this section shall operate as a forfeiture of all rights and privileges of said railroad company under this Act." 246 U.S. at 532, 38 S.Ct. at 358.¹⁰

¹⁰ Without elaborating, the Court in *Soldana* stated that the case of *Clairmont v. United States*, 225 U.S. 551, 32 S.Ct. 787, 56 L.Ed.

Construing Article VIII of the Act of May 1, 1888, in accordance with the dictates of the foregoing principles of construction, and cognizant of the construction afforded this same provision by the United States Supreme Court in the factual context presented in *Soldana*, the court is compelled to conclude that it was not the purpose of Congress to extinguish the Blackfeet Tribe of Indians' beneficial title to the land comprising the right-of-way.

The Burlington Northern fails to present a cogent argument which persuades the court that the right-of-way granted its predecessor in interest across the Blackfeet Reservation should be viewed differently than the right-of-way for the same railroad line granted by Congress across public land. Absent a clearly expressed congressional intent to extinguish the Blackfeet Tribe's beneficial title to the land comprising the right-of-way, this court would be remiss to impute that intent to Congress. See, *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705,

1201 (1912), was factually distinct since *Clairmont* "involved a statute which extinguished the Indian title." 246 U.S. at 530, 38 S.Ct. at 357. The issue presented for resolution in the *Clairmont* case was whether the land comprising a railroad right-of-way held by the Northern Pacific Railroad Company across the Flathead Indian Reservation, Montana, was property considered "Indian country" for the purpose of applying certain federal criminal statutes. The preliminary question resolved was whether Congress acted to extinguish the Indian title to the land comprising the right-of-way. 225 U.S. at 556, 32 S.Ct. at 788. The Court held that by the Act of July 2, 1864, 13 Stat. 365, Congress granted the railroad company fee title to the land constituting the right-of-way. 225 U.S. at 555-56, 32 S.Ct. at 787-88; citing, *Buttz v. Northern Pacific Railroad Company*, 119 U.S. 55, 56, 66, 7 S.Ct. 100, 101, 104, 30 L.Ed. 330 (1887); *Northern Pacific Railway Company v. Townsend*, 190 U.S. 267, 271, 23 S.Ct. 671, 672, 47 L.Ed. 1044 (1903). The Court further held that upon execution of an agreement between the confederated-tribes of the Flathead Indian Reservation, and subsequent approval by Congress of that agreement, see, Ex. Doc. No. 15, 48th Cong., 1st Sess. (1892), the Indians had surrendered and relinquished all right, title and interest to the land comprising the right-of-way. 225 U.S. at 556, 32 S.Ct. at 788.

1711, 20 L.Ed.2d 697 (1968). Consequently, the court is constrained to conclude that the Blackfeet Tribe retains beneficial title to the land comprising the subject right-of-way across the Blackfeet Reservation, and therefore the territorial component essential to the valid exercise of the Blackfeet Tribe's taxing authority is satisfied.

The court finds it unnecessary to specifically address the remaining challenges advanced by the Railroad. The rationale expressed by the court in *Burlington Northern v. Assiniboine-Sioux Tribes of the Fort Peck Reservation*, CV-87-055-GF (D.Mont.1988), adequately disposes of these alternative arguments.¹¹

An appropriate order shall issue.

¹¹ The Blackfeet Tribe obtained approval from the Secretary of the Interior before it adopted its constitution announcing its intention to tax nonmembers. Further, before the ordinance imposing the tax challenged by the Railroad could take effect, the Tribe was required again to obtain approval from the Secretary. See, BLACKFEET CONSTITUTION, art. VI(1)(h). Both the Tribe's constitution and the challenged tax ordinance received the requisite approval from the Secretary of the Interior.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-4428
D.C. No. CV-87-120-PGH

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RES-
ERVATION; BLACKFEET TRIBAL BUSINESS COUNCIL;
BLACKFEET TAX ADMINISTRATION DIVISION; EARL OLD
PERSON, Chairman; ARCHIE ST. GODDARD, Vice-Chair-
man; MARVIN WEATHERWAX, Secretary; ELOISE C.
COBELL, Treasurer,

Defendants-Appellees.

No. 88-4429
D.C. No. CV-87-55-PGH

BURLINGTON NORTHERN RAILROAD COMPANY,
Plaintiff-Appellant,
v.

FORT PECK TRIBAL EXECUTIVE BOARD; FORT PECK TRIBAL
TAX COMMISSION; ASSINIBOINE & SIOUX TRIBES OF THE
FORT PECK INDIAN RESERVATION; KENNETH E. RYAN,
Tribal Chairman; PAULA BRIEN, Tribal Secretary/
Accountant,

Defendants-Appellees.

ORDER

[Filed June 4, 1991]

Before: KOELSCH, BROWNING and BEEZER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

Excerpts from Act of April 15, 1874, ch. 96, 18 Stat. 28

CHAP. 96.—An act to establish a reservation for certain Indians in the Territory of Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following described tract of country, in the Territory of Montana, be, and the same is hereby, set apart for the use and occupation of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President may from time to time, see fit to locate thereon

APPENDIX E

Act of February 15, 1887, ch. 130, 24 Stat. 402

CHAP. 130.—An Act granting to the Saint Paul, Minneapolis and Manitoba Railway Company the right of way through the Indian reservations in Northern Montana and Northwestern Dakota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way is hereby granted, as hereinafter set forth, to the Saint Paul, Minneapolis and Manitoba Railway Company, a corporation organized and existing under the laws of the State of Minnesota, for the extension of its railroad through the lands in Northwestern Dakota set apart for the use of the Arickaree, Gros Ventre, and Mandan Indians by executive order dated July thirteenth, eighteen hundred and eighty, commonly known as the Fort Berthold Indian Reservation, and through the lands in Northern Montana, set apart by act of Congress approved April fifteenth, eighteen hundred and seventy-four, and commonly known as the Blackfeet Indian Reservation.

SEC. 2. That the line of said railroad shall extend from Minot, the present terminus of said Saint Paul, Minneapolis and Manitoba Railway, across said Fort Berthold Reservation, north of the township line between townships numbered one hundred and fifty-three and one hundred and fifty-four north; thence along the Missouri River by the most convenient and practicable route to the valley of the Milk River; thence along the valley of the Milk River to Fort Assinniboine; thence southwesterly to the Great Falls of the Missouri River.

SEC. 3. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid; and said

company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine-shops, sidetracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road.

SEC. 4. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, and until the compensation aforesaid has been fixed and paid; and the surveys construction and operation of such railroad shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

SEC. 5. That the right of way across lands occupied or reserved for military purposes along the line of said railroad is hereby granted to said company the same as across said Indian reservations; *Provided, however,* That the survey and location of said railroad across such lands shall be first approved by the Secretary of War.

SEC. 6. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided,* That the

company may mortgage said franchise, together with the rolling stock, for money to construct and complete said road: *And provided further*, That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order within two years from the passage of this Act.

Approved, February 15, 1887.

APPENDIX F

Excerpts from Act of May 1, 1888, ch. 213, 25 Stat. 113

* * * *

ARTICLE I.

Hereafter the permanent homes of the various tribes or bands of said Indians shall be upon the separate reservations hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation as may be made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth.

ARTICLE II.

The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title, and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation.

* * * *

ARTICLE VIII.

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of Indians concerned.

* * * *

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that said agreement be, and the same is hereby, accepted, ratified, and confirmed.

SEC. 2. That for the purpose of carrying out the terms of said agreement the sum of four hundred and thirty thousand dollars is hereby appropriated, to be immediately available.

SEC. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

SEC. 4. The Secretary of the Interior is hereby authorized to appoint a commission, consisting of three persons, with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reser-

vation, as may be deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made and subject to ratification by Congress before taking effect; and for this purpose the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated, which shall be immediately available.

Approved, May 1, 1888.

APPENDIX G

Adopted 1/27/87
Resolution #2150-87-1

Chapter 3. Utilities Tax

Section 301. *Definitions*

For the purposes of this Chapter, unless the context specifically requires otherwise:

- (a) "Utility" means any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or similar system for transmitting or distributing services or commodities; but does not include roads or highways constructed or maintained by the United States, the Tribes or the State of Montana or a subdivision thereof.
- (b) Property or an interest in property is "used for utility purposes" if it was granted, or is used, in connection with operation of a utility, as that term is defined herein.
- (c) "Utility property" means all property used for utility purposes under any agreement conferring rights to use or possess trust land on the Reservation, other than an agreement transferring full title or full beneficial title, including but not limited to, a lease, right-of-way, use permit or joint venture or operating agreement with the United States or a beneficial owner of land. Utility property shall include all improvements placed on trust land on the Reservation pursuant to such an agreement.
- (d) "Owner" means any person who owns any interest in utility property as grantee, lessee, permittee, assignee, sublessee, or transferee. In the case of parties to a joint venture or operating agreement, the Tribes shall determine whether a joint venture partner or an operator is an owner in light of the terms of the agreement on the

basis of the parties' respective participation in and entitlement to income or profits, assets and management of the venture or operation.

(e) "Person" means any individual, whether Indian or non-Indian, or any organization, including, but not limited to sole proprietorships, partnerships, joint ventures, trusts, estates, unincorporated associations, corporations and governments, or any division, department or agency of any of the foregoing.

(f) "Taxes" includes the tax and any interest, penalties or costs imposed or assessed pursuant to this Chapter.

* * * *

Section 303. *Tax Imposed.*

A tax of three percent (3%) of the value on each assessment date of all utility property is hereby imposed, provided however that all cooperative rural electrical or cooperative rural telephone associations organized and operated not for profit shall pay a tax of one percent (1%) of such value.

Section 304. *Assessment and Valuation.*

(a) The assessment date for each calendar year shall be January 1 of that year. Utility property shall be assessed annually as of the assessment date. The Tribes may assess unassessed utility property as of the date upon which they should have been assessed, and may re-determine incorrect or erroneous assessments.

(b) The value of utility property shall be presumed to be equal to the full value per linear mile of the utility as assessed by the State of Montana pursuant to Chapter 15-23 of the Montana Code Annotated, multiplied by the number of miles of the utility located on trust land within the Reservation. For purposes of this presumption the most recent Montana assessment made prior to the assessment date shall be used. Unless the presumed value

is challenged pursuant to Section 313, the tax shall be levied and collected upon the presumed value.

(c) If a presumption of value is challenged pursuant to Section 313, the value of the utility property shall be determined by the Tax Commission, after a hearing, based on one or more of the following methods:

(1) *Fair market value method.* On the basis of the selling prices of comparable property (whether within or outside the Reservation) which are sold by willing sellers to willing buyers, neither of whom are under a compulsion to act.

(2) *Present value of income method.* By computing the capitalized value of the gross income to be received from the property less the reasonable expenses to be incurred in producing the income, over the remaining useful life of the property.

(3) Any other method which reasonably and accurately reflects the value of the utility property.

Section 305. *Persons liable for payment.*

(a) All owners of utility property are liable for payment of the entire tax assessed upon that interest.

(b) If an owner is an association, joint venture or partnership, the associates, participants or partners both limited and general, shall be jointly and severally liable for the entire tax assessed upon that property.

(c) Each person liable for taxes under this section shall have a right of contribution from any other person liable for a share of the taxes paid proportionate to the share of such person in the utility property. The owners may, by agreement, alter the allocation by contribution of the tax liability among themselves; but no such agreement shall affect the liability to the Tribes of any person named in subsection (a) or (b) hereof.

Section 306. *Exemptions.*

The tax imposed by this Chapter shall not apply to:

- (a) The Assiniboine and Sioux Tribes, any subdivision, agency or program of the Tribes or any enterprise or entity wholly owned by the Tribes;
- (b) The United States or its subdivisions, agencies or departments, except to the extent such taxes are authorized by federal law; or
- (c) Any utility owning utility property on trust lands on the Reservation with a total value of less than \$200,000.

If a utility property is owned in part by entities exempt under this Section and in part by entities not exempt, the proportionate share owned by nonexempt entities shall be subject to tax.

* * * *

RESOLUTION #2150-87-1

TRIBAL GOVERNMENT

WHEREAS, the Fort Peck Tribal Executive Board is the duly elected body representing the Assiniboine and Sioux Tribes of the Fort Peck Reservation and is empowered to act on behalf of the Tribes. All actions shall be adherent to provisions set forth in the 1960 Constitution and By-laws and Public Law #83-449, and

WHEREAS, the Fort Peck Tribes have the authority and the need to tax utility companies on trust property to provide essential government services, and

WHEREAS, the Fort Peck Tribes have initiated a utility tax ordinance for utility property located on trust lands, and

WHEREAS, there was a public hearing held on January 30, 1987 at the Poplar Activity Center by the Reservation Development Committee at which time oral and written testimony was presented from the utility companies and the general public, and

WHEREAS, the Fort Peck Tribes have reviewed the comments and testimony received and have incorporated appropriate concerns into the ordinance, now

THEFORE BE IT RESOLVED, that the Tribal Executive Board does hereby adopt the attached "Utility Tax Ordinance" as a part of the Comprehensive Code, Title XVII, Taxation, Chapter III.

CERTIFICATION

I, the undersigned Secretary/Accountant of the Tribal Executive Board of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, hereby certify that the Tribal Executive Board is composed of 12 voting members of whom 8 constituting a quorum were present at a *Recessed Regular* Board meeting duly called and convened this *27th* day of *January, 1987*, that the foregoing resolution was duly adopted at such meeting by the affirmative vote of *7* for *1* opposed *8* present.

/s/ Paula Brien
PAULA BRIEN
Secretary/Accountant

Recommended:

/s/ [Illegible]
Superintendent, Fort Peck Agency

APPROVED:

/s/ Kenneth E. Ryan
KENNETH E. RYAN
Tribal Chairman
Fort Peck Executive Board

APPENDIX H

THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN NATION

BLACKFEET TRIBAL ORDINANCE PROVIDING FOR A POSSESSORY INTEREST TAX

Number: 80
As Amended
By Resolution No. 213-87

* * * *

Section 3. DEFINITIONS.

Unless the context otherwise requires in this Ordinance, the following definitions shall apply:

(a) *Tribe.*

“Tribe” shall mean the Blackfeet Tribe of the Blackfeet Indian Reservation.

(b) *Blackfeet Indian Reservation or Reservation.*

“Blackfeet Indian Reservation” or “Reservation” shall mean all lands subject to the jurisdiction of the Blackfeet Tribe and includes any and all lands within the exterior boundaries of the Blackfeet Reservation, regardless of whether they are owned in fee, whether they be allotted or Tribal lands, or whether they be otherwise held.

(c) *Chairman.*

“Chairman” shall mean the Tribal Chairman of the Blackfeet Tribe.

(d) *Superintendent.*

“Superintendent” shall mean the Superintendent of the Blackfeet Agency, Bureau of Indian Affairs.

(e) *Tribal Court.*

“Tribal Court” shall mean the Blackfeet Tribal Court as described in the Blackfeet Law and Order Code and does not include the Court of Appeals of the Blackfeet Tribe.

(f) *Court of Appeals.*

“Court of Appeals” shall mean the Blackfeet Court of Appeals as described in the Blackfeet Law and Order Code.

(g) *Taxable Person.*

“Taxable Person” shall mean any person or entity, including any individual, partnership, corporation or other legal entity, having ownership rights in any possessory interest within the Blackfeet Indian Reservation.

(h) *Possessory Interest.*

“Possessory Interest” shall mean any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation, including the value of any property or improvements thereon. Examples of such interests include: (1) those held in fee (2) those held under lease (3) those held under permit (4) those held under an easement or right-of-way.

(i) *Market Value.*

“Market Value” is the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(j) *Commercial Business.*

“Commercial Business” shall mean any person or entity organized primarily for the purpose of operating a retail sales or service business on the Reservation. Commercial Business as defined herein does not include a utility.

(k) *Utility.*

“Utility” shall mean any privately or publicly held entity engaged in supplying, transmitting or distributing electricity, gas, water, telephone, telegraph or other communication services, or transportation services.

Section 4. RATE OF TAX.

The possessory interest tax set forth herein shall be assessed at the rate of four percent (4%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by an ordinance of the Blackfeet Tribal Business Council.

Section 5. COMPUTATION OF VALUE OF POSSESSORY INTEREST.

The value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Tax Administration Division of the Tribe which accurately reflects the fair market value of the possessory interest which is subject to taxation.

(a) *Date of Valuation.*

All property that is subject to valuation under this Ordinance for all or any part of any tax year shall be valued as of October 1st of each year. Tax assessments for the following year shall be made based upon this value.

(b) *Method of Valuation.*

The value of a possessory interest, including all property and improvements thereon, shall be 100% of market value, as that market value is stated on the assessment books of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, said apportionment being made on a mileage basis or on a per unit basis.

(c) *Independent Appraisal Option.*

As an alternative to accepting the market value of any possessory interest subject to the tax as being that market value stated in the assessment book of the county assessor for the county or counties in which the property is located, as apportioned to the Reservation, the Tax Administration Division may have the particular possessory interest assessed by a qualified independent appraiser when both the Tax Administration Division and the taxpayer holding the possessory interest agree in writing:

- (1) on a particular independent appraiser to do the appraisal;
- (2) that the taxpayer shall bear the costs of the independent appraisal;
- (3) to accept the results of the independent appraisal;
- (4) that the independent appraisal shall be completed by November 1st of the year preceding the tax year.

* * * *

Section 11. EXEMPTIONS.

1. No possessory interest which consists of a service line of a utility which exclusively serves the Blackfeet Indian Reservation or of a delivery or distribution facility of a utility which exclusively serves the Blackfeet Indian Reservation shall be subject to this tax. Utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.
2. No possessory interest held by the United States, by the Blackfeet Tribe, by the State of Montana, or by counties, cities, towns or school districts within the State of Montana shall be subject to this tax.

3. No possessory interest in property which is used as a homesite, farm, or ranch whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

4. No possessory interest in property which is used as a commercial business, whether held by or through an allotment or lease thereof, a Blackfeet tribal land assignment or lease, held in fee, or otherwise held, shall be subject to this tax.

* * * *

BLACKFEET TRIBE OF THE BLACKFEET
INDIAN RESERVATION

/s/ Archie S. Goddard acting
EARL OLD PERSON
Chairman

[SEAL]

ATTEST:

CERTIFICATION

I hereby certify that the foregoing Ordinance was adopted by the Blackfeet Tribal Business council in a duly called, noticed and convened Special session assembled for business on the 3rd day of March, 1987, with Six members present to constitute a quorum and by vote of Five members for and -0- members opposed, with one (1) member abstaining.

/s/ [Illegible]
Secretary Blackfeet Tribal Business Council

APPENDIX I

[UNM Logo]

**THE UNIVERSITY OF NEW MEXICO
WORKING PAPERS IN ECONOMICS**

POSSESSORY INTEREST TAX STUDY

**Prepared for the Blackfeet Tribe
of the Blackfeet Indian Nation**

**Department of Economics
The University of New Mexico
Albuquerque, New Mexico 87131**

POSSESSORY INTEREST TAX STUDY

Prepared for the Blackfeet Tribe
of the Blackfeet Indian Nation

Alfred L. Parker
Professor of Economics
Chairman, Department of Economics
University of New Mexico

Introduction

The material presented in this Report has been developed at the request of the Blackfeet Tribe of the Blackfeet Tribe of the Blackfeet Indian Nation. It is the purpose of this Report to provide some basic information concerning the tax ordinance approved by the Tribal Council on December 30, 1986. The information provided includes an economic evaluation of the Possessory Interest Tax, the identification of potential taxpayers and the development of an estimate of the level of tax revenues to be realized by the Blackfeet Tribe from the new ordinance.

* * * *

Desirable Features of the Possessory Interest Tax

There are several features (or characteristics) of the Possessory Interest Tax that make it a very desirable tax from the perspective of the Blackfeet Indian Tribe. The desirable features of the tax include the following:

- (1) *Stability*—The tax base (installed price less depreciation) does not vary much from year to year and thus must be considered a very stable and certain source of revenue for the Blackfeet Indian Tribe. The cost associated with moving installed pipeline, electric transmission or telephone lines or the cost that would be incurred from the abandonment of such facilities supports the conclusion that the Pos-

sessory Interest Tax has considerable stability and predictability over time.

(2) *Exportability*—With few exceptions the property that would be subject to the Possessory Interest Tax are owned by individuals and/or companies located beyond the boundaries of the Blackfeet Indian Reservation and beyond the boundaries of Pondera and Glacier Counties. To the extent that utility bills are impacted by the Possessory Interest Tax, it is clear that most of the additional amounts paid for utility service would come from consumers located beyond the boundaries of the Blackfeet Indian Reservation and Pondera and Glacier Counties. To the extent that revised federal tax codes permit the tax to be shifted through federal income tax deductions, a portion of the tax would be shifted to the federal government.

* * * *

